Supreme Court, U.S.
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No. 09-

IN THE
Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court abuses its discretion by going beyond the allegations in the complaint and examining the factual record to determine whether the named plaintiffs have satisfied the class certification requirements of Federal Rule of Civil Procedure 23.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Mohawk Industries, Inc. ("Mohawk") states that it is a publicly-traded corporation incorporated under the laws of Delaware. Mohawk has no parent corporation, and no publicly-traded company owns ten percent or more of its stock.

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Petitioner Mohawk Industries, Inc. ("Mohawk") respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in *Williams v. Mohawk Industries, Inc.*, No. 08-13446-GG.

OPINIONS BELOW

The decision of the Eleventh Circuit that gives rise to this petition is reported as *Williams v. Mohawk Industries, Inc.*, 568 F.3d 1350 (11th Cir. 2009), the text of which appears in this petition on pages 1a through 21a. The order of the United States District Court for the Northern District of Georgia at issue in the appeal to the Eleventh Circuit is filed as Docket No. 190 in *Williams v. Mohawk Industries, Inc.*, No. 4:04-CV-0003-HLM (N.D. Ga. Mar. 3, 2008). The text of the order appears in this petition on pages 22a through 94a.

STATEMENT OF JURISDICTION

The Eleventh Circuit rendered its judgment on this matter on May 28, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the

representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Federal Rule of Civil Procedure 23(b) provides that:

> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling

> the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Federal Rule of Civil Procedure 23(c)(1)(A) provides that:

> At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

STATEMENT OF THE CASE

This petition arises out of a suit by a putative class of current and former hourly employees of Mohawk who allege that Mohawk hired illegal immigrants and thereby suppressed the wages that plaintiffs were offered and voluntarily accepted. Following the filing of the lawsuit, the parties engaged in extensive class discovery over an eight month period. Upon review of an extensive factual record, the district court denied class certification because the evidence indicated that plaintiffs could not meet the requirements set forth in Federal Rule of Civil Procedure 23. The Eleventh Circuit's decision below held in part that the district court erred by looking beyond the pleadings in evaluating class certification.

That ruling, however, conflicts with the decisions of other circuit courts of appeals, and creates a six to six circuit split on the issue of when a district court may look beyond the pleadings to determine whether to certify a class. This Court should grant certiorari to provide the lower courts with guidance as to a critical issue regarding the scope of a district court's discretion under Rule 23.

1. Plaintiffs are current or former hourly employees of Petitioner Mohawk. On January 6, 2004, they filed a putative class action in the United States District Court for the Northern District of Georgia on behalf of approximately 50,000 of Mohawk's current and former hourly employees.[1]

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[1] The four named plaintiffs were Shirley Williams, Gale Pelfrey, Bonnie Jones, and Lora Sisson. Ms. Williams and Ms. Sisson

Pet. App. 2a. Mohawk is a leading manufacturer of carpets, rugs, tile, and other floor coverings, and has extensive manufacturing operations in Georgia. Mohawk's operations provide good jobs with benefits to tens of thousands of workers in Georgia and elsewhere. In 2007, for example, Mohawk paid an average hourly wage of approximately $13.31 per hour with full benefits. Among other things, those benefits included health care, dental, life insurance, short- and long-term disability, a 401(k) matching program, an annual profit-sharing program, paid vacation, and maternity leave.

Plaintiffs asserted claims for substantive Racketeer Influenced and Corrupt Organizations Act ("RICO") violations under the federal RICO statute (18 U.S.C. § 1962(c)) and the Georgia RICO statute (Ga. Code Ann. § 16-14-4(a)), as well as a Georgia RICO conspiracy claim under Ga. Code Ann. § 16-14-4(c), and a claim for unjust enrichment. All of these claims stemmed from plaintiffs' allegation that Mohawk knowingly employed illegal aliens to depress the wages of all of its legal hourly workers throughout Georgia. See Pet. App. 2a–3a; Compl. ¶¶ 14–31.[2]

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are now deceased and no longer serve as putative class representatives.

[2] The Complaint set forth five alleged RICO predicate acts: (1) knowingly hiring more than ten illegal aliens during a 12-month period, in violation of 8 U.S.C. § 1324(a)(3)(A); (2) harboring illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii); (3) encouraging illegal aliens to enter the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv); (4) accepting false identification documents, in violation of 18 U.S.C. § 1546(a); and (5) using false identification documents, in violation of 18 U.S.C. § 1546(b). See 18 U.S.C. § 1961(1)(B), (F)

2. On March 15, 2004, the district court adopted the parties' Joint Preliminary Report and Discovery Plan. Over an eight-month class discovery period, plaintiffs received everything they demanded from Mohawk. Specifically, in response to 79 document requests, Mohawk produced nearly one million pages and over 20 million electronic records. Plaintiffs also served third-party subpoenas and document requests upon five temporary employment agencies from which Mohawk obtained temporary employees. These agencies produced an additional 10,000 pages to plaintiffs. Plaintiffs also took five depositions of Mohawk's corporate representatives and conducted seven depositions of temporary employment agency representatives.

3. On December 18, 2007, plaintiffs moved under Rule 23(b)(3) and Rule 23(b)(2) to certify a class of legal, hourly employees who have worked or currently worked in Mohawk's facilities in North Georgia.[3] Pet. App. 62a–63a. This proposed class comprised nearly 50,000 workers at 71 locations in ten different counties in the State of Georgia. See *id.* at 27a. Two plaintiffs moved to be class

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(providing that violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 constitute "racketeering activity" for RICO purposes).

[3] Plaintiffs defined their class as follows: "All persons legally authorized to be employed in the United States who are or have been employed in hourly positions by Mohawk Industries, Inc., its subsidiaries or affiliates in Georgia at any time from January 5, 1999 to the present, other than Excluded Employees." Plaintiffs' motion defined "Excluded Employees" as "employees whose employment at Mohawk has been limited to: Dal-Tile, Unilin, or any Mohawk facility or facilities in Milledgeville, Dublin, Tifton, Norcross, Kennessaw or Atlanta, Georgia." Pet. App. 4a.

representatives: Bonnie Jones, a current hourly employee of Mohawk; and Gail Pelfrey, a former Mohawk hourly employee. See 41a–44a; Compl. ¶¶ 5, 7.

On March 3, 2008, the district court denied plaintiffs' motion for class certification. See Pet. App. 93a. In reaching this conclusion, the district court's "rigorous analysis" consisted of its "examin[ation] [as to] whether sufficient evidence exists to reasonably conclude that plaintiffs may proceed in the manner proposed." *Id.* at 63a–65a (internal quotation marks omitted). In an order that spans 136 pages in slip form, the court closely reviewed the facts revealed by extensive class discovery and concluded that no evidence supported plaintiffs' core class allegation: "that [Mohawk] engaged in a *corporate-wide* RICO enterprise with temporary employment agencies to employ illegal workers and thereby depress the wages of workers who were eligible for employment in the United States." *Id.* at 75a n.4 (emphasis added. Instead, the Court found that that the evidence offered no support for the existence of "*one grand conspiracy* to employ illegal workers." *Id.* at 74a (emphasis added).

The district court explained:

> [T]he evidence in the record demonstrates that each of [Mohawk's] five divisions in this case conducted its own hiring, entered into its own relationships with various temporary employment agencies, and had discretion and autonomy to choose whether to enter into such relationships and to set the terms of the relationships. The record further demonstrates

> that each division set its own wages for its non-temporary hourly employees.

Id. "The evidence thus reveals that the relationships with the various temporary employment agencies occurred on a division-by-division or facility-by-facility basis, rather than a corporate-level basis." *Id.* Without a "corporate-wide enterprise" or "one grand conspiracy," the district court held that the plaintiffs failed to establish commonality, typicality, predominance, and superiority under Rule 23. *Id.* at 74a–75a, 77a–78a, 90a–93a. Accordingly, it denied class certification.

4. On March 17, 2008, plaintiffs petitioned the Eleventh Circuit for leave to appeal the district court's order under Rule 23(f). The Eleventh Circuit granted the petition on June 17, 2008.

On May 28, 2009, the United States Court of Appeals for the Eleventh Circuit vacated the district court's order denying class certification. As to Rule 23(a)'s commonality and typicality requirements, the Court held that the allegations in the complaint itself sufficed and that the district court abused its discretion by not relying solely upon those allegations to satisfy Rule 23(a). *Id.* at 12a ("We agree with the employees that *their complaint* raises questions that are common to all members of the class.") (emphasis added); *id.* at 13a ("This claim is typical of the claims of other members of the class because the claims are based on the *same legal theory* .... Although this *legal theory may ultimately not be sustained by the evidence*, it is typical of the class of which [named plaintiffs] are representative.") (emphasis added).

Specifically, the court of appeals concluded that plaintiffs satisfied the commonality requirement because the question of "[w]hether Mohawk conducted the affairs of an enterprise through a pattern of racketeering activity that depressed the wages of all employees is a question *common to each employee's complaint*." *Id.* at 12a (emphasis added). Likewise, the Eleventh Circuit held that plaintiffs satisfied the typicality requirement because the class's claims were based on the "same legal theory," namely: "that the hiring of illegal aliens by Mohawk depressed the wages of all legal hourly workers regardless of location." *Id.* at 13a.

In addition, the Eleventh Circuit required the district court on remand to accept those blanket allegations in conducting the predominance and superiority analyses of Rule 23(b). The court held that the district court erred in its predominance and superiority analyses because it relied upon "its erroneous determination about a lack of common issues." *Id.* at 17a. In so doing, the Eleventh Circuit relied upon its precedent in *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004). The court of appeals explained why, in its view, almost all RICO claims will result in class certification: "In *Klay*, we explained that 'the common issues of fact [in a RICO action], concerning the existence of a[n enterprise and] a pattern of racketeering activity ... are quite substantial. They would tend to predominate over all but the most complex individual issues.'" Pet. App. 14a–15a (quoting *Klay*, 382 F.3d at 1258–59) (alterations in original).

REASONS FOR GRANTING THE PETITION

This case presents a question upon which the circuits are deeply divided: the extent to which a district court may look beyond the pleadings to resolve factual disputes in the record in determining whether to certify a class under Rule 23. In vacating the district court's decision below, the Eleventh Circuit placed severe restrictions on a district court's ability to do so. In so doing, the Eleventh Circuit aligned itself with the Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits. These courts' decisions, however, directly conflict with the conclusions of the First, Second, Third, Fourth, Fifth, and Seventh Circuits.

Indeed, the First Circuit recently noted that "[t]he circuits are ... divided" on whether "the complaint's allegations are necessarily controlling" or whether "a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another." *Tardiff v. Knox County*, 365 F.3d 1, 4–5 & n.5 (1st Cir. 2004).

This division arises in the context of reviewing district court class certification decisions. Under Rule 23, a court may only certify a class if two sets of requirements are met. First, the district court must examine whether the "parties seeking class certification" have satisfied Rule 23(a)'s "four threshold requirements." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997). These threshold requirements are numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a).

These four prerequisites "are necessary but not sufficient conditions for a class action." Fed. R. Civ. P. 23 advisory committee note of 1966. The district court also must conclude that the action falls within one of Rule 23(b)'s "three alternative criteria for maintainability." Manual for Complex Litigation (Fourth) § 21.131 (2009). In the case of an action for money damages under Rule 23(b)(3), a district court must find that the putative class "meet[s] two requirements beyond the Rule 23(a) prerequisites: Common questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem*, 521 U.S. at 615.[4]

This Court's last guidance in this area is almost three decades old. In *General Telephone Co. of the Southwest v. Falcon*, this court held that a district court should conduct a "rigorous analysis" of class certification, noting that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." 457 U.S. 147, 160–61 (1982). In the years since *Falcon*, the circuit courts have divided over the extent

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[4] Rule 23(b) also sets forth two other types of classes. "Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing incompatible standards of conduct for the party opposing the class would as a practical matter be dispositive of the interests of nonparty class members or substantially impair or impede their ability to protect their interests." *Amchem*, 521 U.S. at 614 (citations and internal quotation marks omitted). "Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.'" *Id.*

to which courts must (or may) "probe behind the pleadings." *Id.* at 160. Some courts have read *Falcon* broadly, permitting district courts wide latitude to test allegations that form the basis for proceeding as a class action.

Other courts have construed *Falcon* narrowly and required district courts to defer to allegations in the pleadings. These courts have relied upon language from this Court's decision in *Eisen v. Carlisle & Jacquelin*, which explained that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. 156, 177 (1974). This Court should grant certiorari to resolve the important federal issue of the degree to which district courts can test allegations in determining whether suit can proceed as a class action.

I. This Court Should Resolve The Conflict Among The Courts Of Appeals Regarding Courts' Discretion To Resolve Factual Disputes At The Class Certification Stage.

All twelve regional courts of appeals have grappled with the tension between *Falcon* and *Eisen*, resulting in an acknowledged deep split amongst the circuits.[5] The Eleventh Circuit in the decision below,

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[5] In addition to the First Circuit, numerous courts and commentators have acknowledged the circuit split. See, e.g., *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 299 (D.D.C. 2007) (observing that "Eisen remains good law" in the D.C. Circuit, notwithstanding the contrary "standard for class certification motions operative in other circuits," including Second, Third, Fourth, and Seventh Circuits); David S. Evans,

along with the Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits, require district courts to accept allegations in the pleadings, and do not permit those courts to resolve factual disputes except as to the issue of whether plaintiffs can show common proof of injury. On "the more rigorous end of this spectrum," the "Second, [Third,][6] Fourth, Fifth, and Seventh Circuits ... forbi[d] district courts from relying on plaintiffs' allegations of sufficiently common proof," and require the courts to resolve factual disputes in the process of making findings that plaintiffs have met Rule 23's requirements. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008). See also *Tardiff,*

Class Certification, The Merits, And Expert Evidence, 11 Geo. Mason L. Rev. 1, 8 & n.54 (2002) ("the circuit courts that have considered where the merits fence sits have split" into "two major camps"); Randy J. Kozel & David Rosenberg, *Solving The Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 Va. L. Rev. 1849, 1891 n.69 (2004) ("How much of *Eisen* survives *Falcon* is an open question, and one on which appellate courts have split."); Ian Simmons & Alexander P. Okuliar, *Rigorous Analysis In Antitrust Class Certification Rulings: Recent Advances On The Front Line*, Antitrust 72, 72–73 (Fall 2008) ("The Supreme Court has not accepted review of a class certification ruling for over a decade following the decision in *Amchem*, but a circuit split is opening on the *Eisen/Falcon* dichotomy, and the time may be right for the Court to provide further guidance").

[6] The First Circuit's analysis of the split omitted the Third Circuit, which had not aligned itself until its opinion in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 320 (3d Cir. 2008) (holding that "a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the [Rule 23] requirements"), which issued nine months after the First Circuit's 2008 assessment of the split.

365 F.3d at 4–5 & n.5. The First Circuit similarly has permitted courts to resolve factual disputes that overlap with the merits. *Bowe v. Polymedica Corp.*, 432 F.3d 1, 6 (1st Cir. 2005).

A. The Eleventh Circuit and Five Other Circuits Generally Require District Courts To Accept Allegations In the Pleadings.

The Eleventh Circuit's decision below to vacate the district court's denial of class certification mirrors the approach adopted by the District of Columbia, Sixth, Eighth, Ninth, and Tenth Circuits.

The District of Columbia Circuit has held that district courts may not assess issues that are disputed in the pleadings. In *McCarthy v. Kleindienst*, plaintiffs sought certification under Rule 23(b)(3) of a class of 7,000 individuals who were arrested during a Vietnam War protest. 741 F.2d 1406, 1407–08 (D.C. Cir. 1984). Defendants opposed certification on the ground that defendants had pled the existence of probable cause as an affirmative defense to liability. *Id.* at 1413 n.8. The district court agreed and denied class certification. The D.C. Circuit affirmed, holding that examining a factual dispute over the affirmative defense in the pleadings "would be impermissible at this stage of the proceedings." *Id.* at 1413. In support, the court noted that this Court's opinion in *Eisen v. Carlisle & Jacqueline* prohibited courts from "conduct[ing] a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* (quoting *Eisen*, 417 U.S. at 177).

The Sixth Circuit took a similar view in *Daffin v. Ford Motor Company*, where it held that the court was barred from considering whether the named plaintiff was atypical as a result of an affirmative defense that could bar part of the class from recovery. 458 F.3d 549, 552–54 (6th Cir. 2006). In *Daffin*, plaintiffs sued Ford for a vehicle defect on a theory of breach of express warranty. *Id.* at 550. Ford contended that many proposed class members could not recover under the terms of their vehicles' warranty because the defect had not manifested itself. *Id.* at 552. Further, Ford asserted that the named plaintiff, whose vehicle manifested the defect, was thus not typical of the class as a whole. The Sixth Circuit rejected Ford's argument as an improper challenge at this stage to a "merits issue": "The court may ultimately accept or reject [Ford's] reading of the contract, but a court should not 'conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.'" *Id.* (quoting *Eisen*, 417 U.S. at 177–78). Accord *Beattie v. CenturyTel, Inc.*, 511 F.3d 554 (6th Cir. 2007) (refusing to consider whether affirmative defense precluded finding of typicality).

The Eighth Circuit has adopted a similar approach. In *Blades v. Monsanto*, plaintiffs alleged that the defendant engaged in a price-fixing conspiracy with other producers of genetically modified seeds to increase the prices of such seeds to the plaintiffs. 400 F.3d 562, 565 (8th Cir. 2005). The district court denied class certification. The Eighth Circuit reversed, holding that a district court's discretion to examine the facts is limited. According to the Eighth Circuit, the district court must take the

allegations in the complaint as true, but it can "resolve disputes going to the factual setting of the case." *Id.* at 567. "[S]uch disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, *if the plaintiff's general allegations were true*, to make out a prima facie case for the class." *Id.* (emphasis added).

The Ninth Circuit's decision in *Blackie v. Barrack*, which also holds that a district court must assume the truth of the plaintiff's allegations, similarly restricts the district court's discretion to examine the facts underlying plaintiffs' claims. 524 F.2d 891, 902 n.17 (9th Cir. 1975).[7] The defendants in *Blackie*

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[7] Although *Blackie* was decided before this Court's decision in *Falcon*, *Blackie* continues to be a leading case on this issue in the Ninth Circuit. See, e.g., *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 107–10 (C.D. Cal. 2007) (analyzing *Blackie* to determine "whether the Court may make factual findings in determining whether the requirements of Rule 23 are satisfied"). See also *In re Coord. Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982) (holding, in a post-*Falcon* decision, that "in determining whether to certify the class, the district court is bound to take the substantive allegations of the complaint as true").

Indeed, district courts in the Ninth Circuit still apply *Blackie's* standard even after the Ninth Circuit held in *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir.2007), that "courts are not only 'at liberty to' but must 'consider evidence which goes to the requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case,' *Dukes*, 509 F.3d at 1177 n.2. See, e.g., *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 392 (C.D. Cal. 2008). Moreover, *Blackie* plainly is still a leading case in this circuit in the wake of the Ninth Circuit's order to vacate the *Dukes* decision and to rehear the case *en banc*. See *Dukes v. Wal-Mart, Inc.*, 556 F.3d 919 (9th Cir. 2009) (granting rehearing *en banc*).

challenged certification on the ground that the district court had certified a class solely on speculation that Rule 23 was satisfied, "rather than determining, before certifying the class, that the requirements of [Rule 23] were in fact met." *Id.* at 900. Specifically, the district court "condition[ed] the conclusion that a common question exists on plaintiffs' proof of the allegations; *i.e.*, if plaintiffs prove their allegation of X, X will be a question of fact or law common to the class." *Id.* at 900 n.16. The Ninth Circuit rejected defendants' argument because "[t]he court is bound to take the substantive allegations of the complaint as true." *Id.* at 902 n.17. And because the Supreme "Court made clear in [*Eisen*] that [the Rule 23] determination does not permit or require a preliminary inquiry into the merits," the Ninth Circuit concluded that "the district judge is necessarily bound to some degree of speculation by the uncertain state of the record on which he must rule." *Id.* at 901.

Likewise, the Tenth Circuit requires district courts to presume that the parties' allegations are true when determining whether to certify a class. In *Shook v. El Paso County*, for example, the court of appeals held that in conducting its "rigorous analysis" "the court must accept the substantive allegations of the complaint as true, although it need not blindly rely on conclusory allegations which parrot Rule 23 and may consider the legal and factual issues presented by plaintiff's complaints." 386 F.3d 963, 968 (10th Cir. 2004) (internal quotation marks omitted). See also *Vallario v. Vandehey*, 554 F.3d 1259, 1265 (10th Cir. 2009); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1289–90 (10th Cir. 1999). Similarly, in *Thiessen v. General Electric Capital*, the

Tenth Circuit held that the district court erred in making findings on commonality and predominance issues that overlapped with merits issues, because those findings "encompasse[d] factual issues relevant to [the] trial." 267 F.3d 1095, 1106–08 (10th Cir. 2001).

The District of Columbia, Sixth, Eighth, Ninth, and Tenth Circuits, along with the Eleventh Circuit in the decision below, thus hold that district courts cannot go beyond the parties' allegations in the process of deciding whether plaintiffs have met their burden of satisfying Rule 23's requirements.

B. Six Other Circuits Permit A District Court Broader Discretion To Evaluate Whether A Case Should Proceed As A Class Action.

The First, Second, Third, Fourth, Fifth, and Seventh Circuits have permitted district courts far more latitude at the class certification stage. These circuits have held that courts are not bound by allegations in pleadings. Instead, these circuits allow district courts to make class determinations based upon the facts adduced during class discovery.

In contrast to the Eleventh Circuit's decision below, the First Circuit has held that "the district court was entitled to look beyond the pleadings in ... its resolution of the class-certification question." *Bowe v. Polymedica Corp.*, 432 F.3d 1, 6 (1st Cir. 2005). In *Bowe*, the district court's class certification inquiry "went well beyond the four corners of the pleadings, considering both parties' expert reports and literally hundreds of pages of exhibits." *Id.* at 5. The First Circuit rejected plaintiffs' argument "that a

district court should not engage in a weighing of competing evidence at the class-certification stage, and should instead confine its review to the allegations raised in the plaintiff's complaint." *Id.* Specifically, the court of appeals reaffirmed its "view [that] a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another." *Id.* at 6 (quoting *Tardiff v. Knox County*, 365 F.3d 1, 4–5 (1st Cir. 2004)).

The Second Circuit has held that "a district judge may certify a class only after making *determinations* that each of the Rule 23 requirements has been met." *Miles v. Merrill Lynch & Co., Inc.*, 471 F.3d 24, 41 (2d Cir. 2006) (emphasis added). Such determinations "can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established." *Id.* The court added that this "obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement." *Id.* In a subsequent opinion, the Second Circuit clarified that "the standard of proof applicable to evidence proffered to meet" the Rule 23 requirements is "preponderance of the evidence." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008). See also *Loftin v. Bande*, __ F.3d __, 2009 WL 2169197 at *9-10 (2d Cir. Jul. 22, 2009) (reversing class certification because district court "was required to find, by a preponderance of the evidence, that [named plaintiff] is both an adequate and typical representative of the class").

Similarly, the Third Circuit in *Johnston v. HBO Film Management* affirmed a district court's denial of class certification on the ground that the evidence in the "well-developed record" rebutted allegations in the pleadings. 265 F.3d 178, 186 (3d Cir. 2001). The *Johnston* plaintiffs were a group of investors in a limited partnership who brought claims for federal RICO violations against a group of defendants who had allegedly marketed the investment opportunity. *Id.* at 181. The district court concluded that the evidence from class discovery failed to support plaintiffs' allegations of uniform misrepresentations, and thus it declined to certify the class. *Id.* at 186. On appeal to the Third Circuit, therefore, the "issue ... [was] whether in making a class certification decision the court must take as true the allegations in the complaint where those allegations are unsupported, and in some instances rebutted, by a well-developed record." *Id.* The court of appeals affirmed, concluding that it was "not only ... appropriate, but also necessary, for the district court to examine the factual record underlying plaintiffs' allegations in making its certification decision." *Id.* at 189.

The Fourth Circuit applied this same standard in *Gariety v. Grant Thornton LLP* to reverse a district court's class certification order. 368 F.3d 356 (4th Cir. 2004). Plaintiffs in *Gariety* in part alleged that Grant Thornton committed securities fraud in connection with the demise of a bank. *Id.* at 359–60. Plaintiff sought certification of a class comprised of "persons who purchased [the bank's] stock." *Id.* at 361. "Pointing to the allegations of their complaint," plaintiffs argued that they were entitled to a presumption of reliance at the Rule 23 stage. *Id.* The

district court certified the class over Grant Thornton's objection that "plaintiffs were not entitled to the presumption because [the bank's] stock was not in fact traded on an efficient market." *Id.* The Fourth Circuit reversed, "conclud[ing] that, by accepting the plaintiffs' allegations for purposes of certifying a class in this case, the district court failed to comply adequately with the procedural requirements of Rule 23." *Id.* at 365. "Because the district court concededly *failed to look beyond the pleadings and conduct a rigorous analysis* of whether [the bank's] shares traded in an efficient market," the Fourth Circuit remanded "to permit the district court to conduct the analysis and make the findings required by Rule 23(b)(3)." *Id.* at 367 (emphasis added).

Likewise, the Fifth Circuit in *Oscar Private Equity Investments v. Allegiance Telecom* vacated a certification order because the district court had also relied only on plaintiff's allegations. 487 F.3d 261, 266 (5th Cir. 2007). As in *Gariety*, the *Oscar* defendants attacked a presumption of reliance because "[w]ithout [it], questions of individual reliance would predominate, and the proposed class would fail." *Id.* at 264. The district court rejected defendants' challenge on the ground that "the class certification stage is not the proper time for defendants to rebut lead Plaintiffs' fraud-on-the-market presumption." *Id.* at 266. The Fifth Circuit reversed, holding that "the district court must consider all evidence, both for and against loss causation, at the class certification stage." *Id.* Because plaintiffs' "evidence ... is little more than well-informed speculation," the court of appeals held that "the district court abused its discretion in

finding that plaintiffs made a showing sufficient to establish loss causation." *Id.* at 266, 271.

The Seventh Circuit also has held that a district court abuses its discretion by certifying a "class without resolving factual and legal disputes that strongly influence the wisdom of class treatment." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). In that case, the district court certified a national class of individuals who had purchased machine tools manufactured by defendant, alleging that the defendant made fraudulent misrepresentations about the tools. *Id.* at 673. In certifying the class, the district court assumed that because "class determination is made at the pleading stage of the action, the substantive allegations in the complaint are accepted as true for purposes of the class motion." *Id.* at 675. The Seventh Circuit disagreed, holding that the district court should have made "whatever factual and legal inquiries are necessary under Rule 23" "[b]efore deciding whether to allow a case to proceed as a class action." *Id.* at 676. "The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it." *Id.* at 675. "Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification." *Id.* at 677.

The approach of these courts of appeals are flatly inconsistent with the Eleventh Circuit's decision below, which held that the district court abused its discretion by not deferring to the plaintiffs' allegations in the complaint. These courts have noted that such deference "frustrat[es] the district court's

responsibilities for taking a 'close look' at relevant matters, for conducting a 'rigorous analysis' of such matters, and for making 'findings' that the requirements of Rule 23 have been satisfied." *Gariety*, 368 F.3d at 365 (quoting *Amchem*, 521 U.S. at 615, *Falcon*, 457 U.S. at 161, and Fed. R. Civ. P. 23(b)(3)). Accord *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 312 n.9 (5th Cir. 2005); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 n.15 (3d Cir. 2008). "Certifying classes on the basis of incontestable allegations in the complaint moves the court's discretion to the plaintiff's attorneys—who may use it in ways injurious to other class members, as well as ways injurious to defendants." *Szabo*, 249 F.3d at 677.[8] This Court should grant certiorari to resolve the deep division that exists between the courts of appeals.

II. This Case Raises An Important Question Concerning The District Court's Discretion To Determine Whether A Suit May Proceed As A Class Action.

The issue presented by this petition is a critical issue with which all regional circuits have struggled. As the Third Circuit observed recently, "little guidance is available on the subject of the proper

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[8] See also *Gariety*, 368 F.3d at 365 ("If it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order."); *Oscar*, 487 F.3d at 267 ("We cannot ignore the *in terrorem* power of certification, continuing to abide the practice of withholding until 'trial' a merit inquiry central to the certification decision, and failing to insist upon a greater showing.")

standard of 'proof' for class certification." *Hydrogen Peroxide*, 552 F.3d at 316. See also *Miles v. Merrill Lynch & Co., Inc.*, 471 F.3d 24, 33 n.4 (2d Cir. 2006) ("Apart from *Falcon* and *Eisen*, the Supreme Court has said little about meeting Rule 23 requirements.").

The opinion below too narrowly confines a district court's discretion and requires certification even if the key allegations supporting class certification lack a scintilla of evidence in support. Nothing in Rule 23 requires that a district court so restrict its inquiry. Rule 23(c)(1)(A) provides that "the court must determine by order whether to certify the action as a class action," and that this determination must be made "[a]t an early practicable time after a person sues or is sued as a class representative." *Id.* Rule 23(b)(3) provides that a damages class may be certified "if the court *finds*" that common questions predominate and that a class action is a superior method of adjudicating the controversy. *Id.* (emphasis added). See also *id.* (identifying "matters pertinent to these *findings*") (emphasis added).

The Eleventh Circuit's artificial restriction of a district court's discretion is especially inappropriate given the importance of the certification decision itself. "A district court's ruling on the certification issue is often the most significant decision rendered" in the course of a class action. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). And, although "[c]lass actions serve an important function in our system of civil justice," they also "present ... opportunities for abuse." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99–100 (1981). Indeed, this Court has noted that the "potential for misuse of the class action

mechanism is obvious." *Deposit Guar. Nat'l Bank*, 445 U.S. at 339.

Rule 23's requirement that a case meet all of the hurdles in that rule reflects a recognition that certification imposes an "intense pressure to settle," which exists even where the underlying claim lacks merit. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995). See also *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784–85 (3d Cir. 1995) ("*GMC Pickup*") (acknowledging that "class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth"); Judge Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973) (discussing "blackmail settlements"). Accordingly, "[d]istrict courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of potentially ... frivolous class actions." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979).

Similarly, the "drafters designed the procedural requirements of Rule 23, especially the requisites of subsection (a), so that the court can assure, to the greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests." *GMC Pickup*, 55 F.3d at 785. In conducting this analysis under Rule 23(a), the court plays the "important role of protector of absentees' interests." *Id.* at 784.

Accordingly, the court performs its certification analysis by acting "in a sort of fiduciary capacity, by approving appropriate representative plaintiffs and class counsel." *Id.* at 784–85.

In order to ensure that all of these interests are served, this Court has explained that district courts "have broad power and discretion vested in them by [Rule] 23 with respect to matters involving the certification" of class actions. *Reiter*, 442 U.S. at 344–45. See also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 630 (1997) (Breyer, J., concurring in part and dissenting in part) (noting that "[t]he law gives broad leeway to district courts in making class certification decisions"). The district court should not defer to plaintiffs' allegations in its Rule 23 analysis because "an order certifying a class usually is the district judge's last word on the subject; there is *no later test of the decision's factual premises* (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional)." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (emphasis added).

The Eleventh Circuit's holding below—like that of many of its sister circuits—too narrowly confines a district court's discretion in determining whether Rule 23's criteria have been met. Indeed, under the holdings of these courts, all a named plaintiff must do to obtain certification is artfully craft a complaint and offer a method of calculating damages across the class. On this view, a district court lacks any discretion to look behind the allegations to determine, for example, if *in fact* the putative class members

actually have common questions and if named plaintiffs' claims are truly typical.

Plaintiffs in this case alleged that a single enterprise and conspiracy exists and has depressed the wages of almost 50,000 workers. Before deciding whether to certify the class, the district court examined the record to determine if those 50,000 workers in actuality shared common issues and, if so, whether the named plaintiffs' claims were typical of the rest of the putative class. See Pet. App. 2a–56a. The court concluded that they did not share common issues for a number of critical reasons. Most importantly, the district court found that despite extensive class discovery, plaintiffs could point to not a shred of evidence supporting the notion that a single enterprise or conspiracy existed. See *id.* at 74a, 75a n.4, 90a–91a. Without one, however, nothing tied the claims of class members together, especially given the evidence showing that wages were set, temporary agencies were retained, and hiring decisions were made on a decentralized basis involving hundreds of people working independently. See, e.g., *id.* at 74a (finding that "the evidence in the record indicates that [Mohawk's] operations ... are extremely decentralized," including with respect to hiring, "wage-setting practices," and "use of temporary employment agencies").

The Eleventh Circuit, however, cast aside the district court's findings and largely required the court to defer to plaintiffs' unsupported allegations. Indeed, under the holding below (and in other circuits), district courts must certify classes in cases alleging almost any RICO enterprise or conspiracy—no matter how far-fetched or lacking in evidentiary

support. In fact, had plaintiffs below alleged that the enterprise consisted of *every* employer of hourly workers in Georgia, the Eleventh Circuit's decision on class certification would not change: a district would be forced to find that prerequisites such as commonality and typicality exist and the only issue is whether plaintiffs could show a common method of proving injury.

Restraints such as those imposed by the decision below are flatly inconsistent with the discretion Rule 23 delegates to district courts.[9] This Court should grant certiorari to clarify the discretion district courts have in determining whether to certify class actions.

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[9] Although testing a plaintiff's allegations at the pleading stage has divided this Court, even the dissent in those cases acknowledged that a plaintiff's allegations could be tested at the class certification stage. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 593 n.13 (2007) (Stevens, J., dissenting) (approving of Second Circuit's view that "a district court may not certify a class without ruling that each Rule 23 requirement is met, even if a requirement overlaps with a merits issue").

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant this petition. This Court should grant the petition to resolve the conflict among the courts of appeals as to whether a district court abuses its discretion by going beyond the allegations in the complaint and examining the factual record to determine whether the named plaintiffs have satisfied the class certification requirements of Federal Rule of Civil Procedure 23.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 08-13346

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, LORA SISSON, individually and on behalf of a class,

Plaintiffs-Appellants,

v.

MOHAWK INDUSTRIES, INC.,

Defendant-Appellee.

May 28, 2009

Appeal from the United States District Court for the Northern District of Georgia.

Before BARKETT, PRYOR and FARRIS,* Circuit Judges.

PRYOR, Circuit Judge:

This appeal concerns whether the district court abused its discretion when it denied a motion to certify a class action for employees of Mohawk Industries who complain that Mohawk engaged in racketeering activity by hiring illegal aliens and depressing the employees' wages. This appeal is the

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* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

third time that our Court has considered issues in this litigation. *Williams v. Mohawk Indus., Inc.* (*Mohawk I*), 411 F.3d 1252 (11th Cir.2005) (per curiam); *Williams v. Mohawk Indus., Inc.* (*Mohawk II*), 465 F.3d 1277 (11th Cir.2006) (per curiam). We conclude that the district court abused its discretion when it denied the employees' motion for class certification. The district court erred when it ruled that the employees' complaint fails to present issues of law or fact common to the class, Fed. R. Civ. P. 23(a)(2), and when it ruled that the claims of the proposed representatives are not typical of the claims of the absent class members, *id.* (a)(3). Those errors also led the district court to misapply the standard for determining whether the employees may maintain a class action for compensatory relief, *id.* (b)(3), and a hybrid class for injunctive relief, *id.* (b)(2). We reverse and remand for further proceedings.

I. BACKGROUND

Our discussion of the background is divided in two parts. First, we discuss the course of the litigation before the employees moved to certify a class action. Second, we discuss the employees' motion for class certification and the denial of that motion by the district court.

A. The Course of the Litigation

On January 6, 2004, current and former employees of Mohawk who worked for hourly wages at various facilities in northern Georgia filed a complaint that Mohawk engaged in a pattern of racketeering activity prohibited by the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §

1962(c), by hiring and harboring illegal aliens in violation of the Immigration and Nationality Act, 8 U.S.C. §§ 1324(a)(1)(A)(iii), (a)(1)(A)(iv), (a)(3)(A). The employees alleged that Mohawk formed an enterprise with various temporary employment agencies to hire illegal aliens and depress wages. The employees alleged that they were harmed by the racketeering activity of Mohawk because their wages were depressed. The employees also alleged that Mohawk violated the Georgia statute that prohibits racketeering activity, Ga. Code Ann. § 16-14-4(a), (c), by committing various predicate acts involving fraud and misuse of visas, 18 U.S.C. §§ 1546(a), (b), and that Mohawk was unjustly enriched by its criminal activities under the law of Georgia.

Mohawk moved to dismiss the employees' complaint for failure to state a claim, Fed. R. Civ. P. 12(b)(6). The district court granted the motion as to one claim of unjust enrichment based on the alien workers' hesitation to bring worker's compensation claims, but denied the motion as to all other claims. At the request of Mohawk, the district court certified the order for an interlocutory appeal. We affirmed the decision of the district court that the employees stated claims under the federal and Georgia RICO statutes, but we reversed the decision that the employees stated a separate claim for unjust enrichment about agreed-upon wages. *Mohawk I*, 411 F.3d at 1266.

Mohawk petitioned the Supreme Court for a writ of certiorari and raised two questions for review: (1) whether a defendant corporation and its agents may constitute an enterprise under RICO; and (2) whether the employees had stated a claim that the alleged

practices of Mohawk proximately caused injuries to business property in the form of depressed wages. The Supreme Court granted certiorari as to the first question, but then dismissed the petition as improvidently granted and remanded to our Court for further consideration in the light of *Anza v. Ideal Steel Supply Corporation*, 547 U.S. 451, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006). *Mohawk Indus., Inc. v. Williams*, 547 U.S. 516, 126 S.Ct. 2016, 164 L.Ed.2d 776 (2006). We again concluded that the claims of unjust enrichment failed and that the employees stated claims of racketeering under state and federal statutes, and we remanded to the district court for further proceedings. *Mohawk II*, 465 F.3d at 1295.

B. The Class Certification Decision

After discovery commenced, the employees moved to certify the following class of lawful employees of Mohawk in North Georgia:

> All persons legally authorized to be employed in the United States who are or have been employed in hourly positions by Mohawk Industries, Inc., its subsidiaries or affiliates in Georgia at any time from January 5, 1999 to the present, other than Excluded Employees.
>
> Excluded Employees are employees whose employment at Mohawk has been limited to: Dal-Tile, Unilin, or any Mohawk facility or facilities in Milledgeville, Dublin, Tifton, Norcross, Kennesaw or Atlanta, Georgia.

The employees sought certification of one of their claims under Georgia law, Ga. Code Ann. § 16-14-4(a), for injunctive relief under Federal Rule of Civil

Procedure 23(b)(2), and sought certification of all of their claims under Rule 23(b)(3).

The employees alleged several common questions when they sought certification, including whether "Mohawk conducted or participated, directly or indirectly, in the conduct of an enterprise's affairs," whether "Mohawk engaged in a pattern of racketeering activity," and whether "Mohawk engaged in a pattern of racketeering activity .... [or] a conspiracy to violate § 16-14-4(a) of the Georgia RICO statute." Mohawk argued that its hiring and wage-setting practices were decentralized and differed significantly over time, that there was no evidence of a single enterprise or conspiracy, and that proof of injury was not possible. The employees responded that "Mohawk's decentralization mantra" was irrelevant to the commonality analysis because the employees had alleged common questions for which they would present common proof.

The employees also argued that the claims of the named plaintiffs were typical: "The Named Plaintiffs' claims and the claims of the class members arise out of the same 'course of conduct' (the operation and management of an enterprise through which Mohawk hires and harbors illegal workers) and 'the same legal theory' (that this unlawful conduct depresses wages)." Mohawk responded that the claims of plaintiffs Jones and Pelfrey were not typical because Jones never worked at a Mohawk location that used temporary labor and Pelfrey was a former employee. The employees responded that Jones's claim was typical because her allegation, like the allegation of the class, was that the illegal hiring by Mohawk depressed all the wages of legal employees, regardless of location.

The employees also argued that the scheme by Mohawk to hire and harbor illegal workers satisfied the requirement that a defendant "has acted ... on grounds that apply generally to the class," Fed. R. Civ. P. 23(b)(2). Mohawk argued against certification under subsection (b)(2) on the ground that the damages sought by the employees were not incidental to their claim for equitable relief. The employees responded that they were seeking certification of a hybrid class for only injunctive relief under subsections (b)(2) and (c)(4), and that class would be separate from the class for which they were seeking monetary damages under subsection (b)(3).

The employees argued that the common issues whether Mohawk conducted the affairs of an enterprise, engaged in a pattern of racketeering activity, and participated in a conspiracy, and whether and to what extent the class suffered injury predominated because those issues would have to be resolved in every class member's individual action. Mohawk argued that hiring and wage-setting differed across the class, there was no evidence of a single enterprise or conspiracy, there was no common method of proving injury or damages, and defenses based on statutes of limitation would require individual determinations. The employees responded that any hiring and wage discretion did not negate the existence of common questions, arguments about the existence of an enterprise and damages were premature arguments about the merits of their complaint, and the employees sought only damages incurred during the limitations period.

The district court denied class certification. The district court determined that the employees satisfied

the requirements of numerosity, Fed. R. Civ. P. 23(a)(1), and adequacy of representation, *id.* (a)(4), but that the employees did not satisfy the requirements of commonality, *id.* (a)(2), and typicality, *id.* (a)(3). The district court agreed with Mohawk that the employees had not satisfied the commonality requirement because "[c]ontrary to Plaintiffs' arguments that Defendant engaged in one grand conspiracy to employ illegal workers, the evidence in the record indicates that Defendant's operations, including its use of temporary employment agencies and wage-setting practices, are extremely decentralized." The district court also agreed with Mohawk that neither of the proposed class representatives presented claims typical of the class because Jones never worked at a Mohawk facility that used temporary labor and because both Jones and Pelfrey "worked at only a handful of [Mohawk's] facilities."

The district court agreed with Mohawk that a class could not be certified under subsection (b)(2). The district court concluded that the employees' demand for monetary damages was not incidental to their demand for injunctive relief. The district court also declined to certify a "hybrid class" for both monetary and injunctive relief on the ground that having one jury "resolve all of the many individual and case-specific issues relating to Plaintiff's claims before the Court issued a ruling as to equitable remedies would be overly cumbersome, confusing, and highly inefficient."

The district court refused to certify a class under Rule 23(b)(3) on the grounds that common issues did not predominate and the class action would not be

superior to other available methods of relief. The district court again relied on the corporate structure of Mohawk when it determined that class litigation would present an "unmanageable number of individual legal and factual issues" because "the evidence in the record fails to support a determination that Defendant engaged in a relationship with the various temporary employment agencies at a corporate-wide level." The district court determined that the first three factors in the superiority analysis weighed in favor of the employees, but the district court determined that the "manageability" factor "tips the scales in favor of concluding that Plaintiffs have failed to satisfy the superiority requirement .... [because] [a]s previously noted, resolution of the issues involved in this case will, by necessity, break down into an unmanageable number of individual legal and factual issues."

The district court did not evaluate the employees' expert testimony. The district court concluded that arguments by Mohawk attacking the experts were "essentially ... [evidentiary] challenges or challenges to the merits of the opinions offered by Plaintiffs' experts." The district court determined that "the expert evidence presented by Plaintiffs is sufficiently probative to be useful to the Court in determining whether Plaintiffs have satisfied the requirements for class certification."

II. STANDARD OF REVIEW

We review a denial of class certification for an abuse of discretion. *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1337 (11th Cir.2006). "[A]n abuse of discretion occurs if the judge

fails to apply the proper legal standard or to follow proper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Birmingham Steel Corp. v. TVA*, 353 F.3d 1331, 1335 (11th Cir. 2003) (internal quotation marks and alterations omitted).

III. DISCUSSION

Our discussion is divided in four parts. First, we address the employees' argument that the district court abused its discretion when it determined that the employees did not present a question of law or fact that was common to all members of the class under Rule 23(a)(2). Second, we address the employees' argument that the district court abused its discretion when it determined that the claims of the proposed class representatives were not typical of the claims of the class under Rule 23(a)(3). Third, we address the employees' argument that the district court abused its discretion when it determined that the questions of law or fact common to all class members do not predominate over any questions affecting individual members and that a class action is not superior under Rule 23(b)(3). Fourth, we address the employees' argument that the district court abused its discretion when it declined to certify a hybrid class for injunctive relief under Rule 23(b)(2) and (c)(4).

A. The District Court Abused Its Discretion When It Determined That the Employees Failed To Present Questions of Law or Fact Common to All Members of the Class.

A class may be certified only if "there are questions of law or fact common to the class." Fed. R.

Civ. P. 23(a)(2). "Under the Rule 23(a)(2) commonality requirement, a class action must involve issues that are susceptible to class-wide proof." *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001). Commonality requires "that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir.1982) (footnote omitted).

The employees presented two overarching questions that are common to all members of the class: (1) whether "Mohawk conducted or participated, directly or indirectly, in the conduct of an enterprise's affairs" under the federal RICO statute; and (2) whether "Mohawk engaged in a pattern of racketeering activity .... [or] a conspiracy to violate § 16-14-4(a) of the Georgia RICO statute." Under section 1962(c) of the federal RICO statute, the employees " 'must satisfy four elements of proof: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Mohawk I*, 411 F.3d at 1256 (quoting *Jones v. Childers*, 18 F.3d 899, 910 (11th Cir.1994)) (internal quotation marks omitted). As to elements one and two, all the employees must prove that Mohawk "participate[d] in the operation or management of the enterprise," *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S.Ct. 1163, 1173, 122 L.Ed.2d 525 (1993). As to elements three and four, all the employees must prove that Mohawk engaged in a pattern of racketeering activity by hiring and harboring illegal aliens. The law of Georgia makes it "unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any

interest in or control of any enterprise, real property, or personal property of any nature, including money." Ga. Code Ann. § 16-14-4(a). The Georgia RICO statute does not require proof of an enterprise, but it requires " 'proof that the defendant committed predicate offenses ... at least twice.'" *Mohawk I*, 411 F.3d at 1264 (quoting *Cobb County v. Jones Group, P.L.C.*, 218 Ga. App. 149, 154, 460 S.E.2d 516, 521 (1995)). All the employees allege and must prove under Georgia law that Mohawk violated federal criminal prohibitions of fraud and misuse of visas, 18 U.S.C. § 1546, which is a predicate offense under the law of Georgia, Ga.Code. Ann. § 16-14-3(9). These are all common questions because each employee would have to prove these elements of their claims of racketeering activity under federal and state law to establish the liability of Mohawk.

We agree with the employees that the district court erred when it relied on our precedents about the certification of a class action for a complaint of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. In *Klay v. Humana, Inc.*, 382 F.3d 1241, 1257 (11th Cir.2004), we explained that claims under RICO, in contrast with claims under Title VII, are often susceptible to common proof:

> RICO claims are not simply individual allegations of underpayments lumped together, and the allegation of an official corporate policy or conspiracy is not simply a piece of circumstantial evidence being used to support such individual underpayment claims. Instead, the very gravamen of the RICO claims is the "pattern of racketeering activities" and the

> existence of a national conspiracy .... These are not facts from which jurors will be asked to infer the commission of wrongful acts against individual plaintiffs; these very facts constitute essential elements of each plaintiff's RICO claims.

The district court relied on the decentralized decisions of Mohawk about hiring and wages to conclude that the employees' complaint does not present questions common to the class, but the employees' complaint is not dependent on proof of individual acts of disparate treatment as often is the case under Title VII.

We agree with the employees that their complaint raises questions that are common to all members of the class. These common questions are sufficient to satisfy the low hurdle of Rule 23(a)(2). Whether Mohawk conducted the affairs of an enterprise through a pattern of racketeering activity that depressed the wages of all employees is a question common to each employee's complaint. The district court abused its discretion when it ruled that the employees' complaint did not present questions of law or fact common to the proposed class.

B. The District Court Abused Its Discretion When It Determined That the Named Plaintiffs Did Not Present Claims that Were Typical of the Class.

A class may be certified only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The claim of a class representative is typical if "the claims or defenses of the class and the class representative arise from the same event or pattern

or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir.1984). "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Auslander*, 244 F.3d at 811. "The typicality requirement may be satisfied despite substantial factual differences ... when there is a strong similarity of legal theories." *Id.* (internal quotation marks omitted).

We agree with the employees that the district court abused its discretion when it ruled that the claims of Jones and Pelfrey were not typical of the claims of absent class members. Jones and Pelfrey allege that Mohawk conducted the affairs of an enterprise by hiring illegal labor, which depressed the employees' wages. This claim is typical of the claims of other members of the class because the claims are based on the same legal theory. Because the employees' claim is that the hiring of illegal aliens by Mohawk depressed the wages of all legal hourly workers regardless of location, whether the two class representatives worked at a few locations is irrelevant. Although this legal theory may ultimately not be sustained by the evidence, it is typical of the class of which Jones and Pelfrey are representative.

C. The District Court Abused Its Discretion When It Considered Whether To Certify a Class Action Under Rule 23(b)(3).

A class action may be certified under subsection (b)(3) if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and

that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "Common issues of fact and law predominate if they 'ha[ve] a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief.'" *Klay*, 382 F.3d at 1255 (quoting *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 699 (N.D.Ga.2001)) (alteration in original). "'[S]erious drawbacks to the maintenance of a class action are presented where initial determinations, such as the issue of liability *vel non*, turn upon highly individualized facts.'" *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1235-36 (11th Cir. 2000) (quoting *McCarthy v. Kleindienst*, 741 F.2d 1406, 1415 (D.C. Cir. 1984)). "[T]he Rule requires a pragmatic assessment of the entire action and all the issues involved." 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.45[1], at 23-217 (3d ed.2008). "Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3)." *Klay*, 382 F.3d at 1255. "Even if Rule 23(a)'s commonality requirement may be satisfied ..., the predominance criterion is far more demanding." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24, 117 S.Ct. 2231, 2250, 138 L.Ed.2d 689 (1997).

In *Klay*, we explained that "the common issues of fact [in a RICO action], concerning the existence of a[n enterprise and] a pattern of racketeering activity ... are quite substantial. They would tend to

predominate over all but the most complex individual issues." 382 F.3d at 1258-59. "It is primarily when there are significant individualized questions going to liability that the need for individualized assessments of damages is enough to preclude 23(b)(3) certification." *Id.* at 1260.

Although "a court should not determine the merits of a claim at the class certification stage, it is appropriate to 'consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.'" *Heffner*, 443 F.3d at 1337 (quoting *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1188 n. 15 (11th Cir. 2003)). A district court must consider, for example, how the class will prove causation and injury and whether those elements will be subject to class-wide proof:

> [T]he issue of liability ... includes not only the question of violation, but also the question of fact of injury, or impact .... In making the determination as to predominance, of utmost importance is whether "impact" should be considered an issue common to the class and subject to generalized proof, or whether it is instead an issue unique to each class member, and thus the type of question [that] might defeat the predominance requirement of Rule 23(b)(3).

Alabama v. Blue Bird Body Co., 573 F.2d 309, 320 (5th Cir.1978). "[I]f generalized proof of impact is ... improper, then the district court must carefully consider whether this requirement of individual proof does not defeat the class certification on either predominance or manageability grounds." *Id.* at 324.

Certification under Rule 23(b)(3) also requires that the class action device "is superior to other available methods for fairly and efficiently adjudicating the controversy." "In many respects, the predominance analysis ... has a tremendous impact on the superiority analysis ... for the simple reason that, the more common issues predominate over individualized issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims." *Klay*, 382 F.3d at 1269. Rule 23(b)(3) provides what the Advisory Committee Notes describe as a non-exhaustive list of four factors that are pertinent to the finding of superiority:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3).

Although the district court concluded that the employees' proposed class action would be unmanageable, we have explained two reasons that the factor of manageability is ordinarily satisfied so long as common issues predominate over individual issues:

> First, we are not assessing whether this class action will create significant management problems, but instead determining whether it will create relatively more management

> problems than any of the alternatives .... Second, where a court has already made a finding that common issues predominate over individualized issues, we would be hard pressed to conclude that a class action is less manageable than individual actions.

Klay, 382 F.3d at 1273. If a district court determines that issues common to all class members predominate over individual issues, then a class action will likely be more manageable than and superior to individual actions.

The district court failed to conduct a rigorous analysis of predominance and superiority. The district court instead repeated its erroneous determination about a lack of common issues. The district court stated, without any meaningful explanation, that the decentralized decisions of Mohawk regarding hiring and wages of hourly employees would mean that any common issues would "by necessity, break down into an unmanageable number of individual legal and factual issues." Because the district court abused its discretion by repeating its error about issues common to all class members, the district court did not and could not conduct the correct analysis to determine whether questions affecting only individual members predominated over questions common to all members of the class.

The employees argue that their injury is subject to common proof because every employee was damaged by the illegal hiring by Mohawk, irrespective of an employee's job description or location, but the district court failed to address the employees' argument

about classwide proof. The district court instead accepted the employees' expert testimony without examining it or explaining its affect on the predominance analysis. On remand, the district court must test and evaluate the employees' argument that their injury is subject to common proof.

We remand for the district court to conduct a pragmatic assessment of whether common issues predominate over individual issues and whether a class action is superior to other forms of relief under Rule 23(b)(3). Because the denial of class certification by the district court turned on the erroneous premise that there were no questions common to the class, the district court failed to consider whether the common issues predominated over individual issues and whether a class action was superior to individual actions. *See Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1288 (11th Cir. 2001) (holding that a denial of class certification should be vacated and remanded "to the extent it turned on the [incorrect] notion that Green could not serve as a class representative"). These are questions "for the district court to address in the first instance, not this Court." *Id.*

D. If It Certifies a Class Under Rule 23(b)(3), the District Court Must Determine Whether Certification of a Hybrid Class Under Rule 23(b)(2) and (c)(4) Is Appropriate.

The employees admit that they are not entitled to maintain a class action under Rule 23(b)(2) for most of their claims. Certification of a class under subsection (b)(2) is appropriate when "the party opposing the class has acted or refused to act on

grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Monetary damages are "legal relief that can only be awarded in a Rule 23(b)(2) class action when the damages sought are incidental to the claims for equitable and declaratory relief." *Cooper v. Southern Co.*, 390 F.3d 695, 720 (11th Cir. 2004) (internal quotation marks omitted). "[T]he advisory committee's note to Rule 23 explains that certification under section (b)(2) is not proper in 'cases in which the appropriate final relief relates exclusively or predominantly to money damages.'" *Id.* at 721 (quoting Fed. R. Civ. P. 23(b)(2), advisory committee's note (emphasis added)). It is undisputed that the employees seek primarily treble compensatory damages and punitive damages.

The employees seek a class for injunctive relief, under Rule 23(b)(2), as to one of their claims under state law, Ga.Code. Ann. § 16-14-4(a), and the employees argue that the district court should certify a hybrid class for that claim under Rule 23(c)(4), which permits certification "with respect to particular issues." Fed. R. Civ. P. 23(c)(4). We have explained that a "hybrid class action" may be certified in some cases:

> "It is possible to create hybrids in given cases. Since in theory there should be no hard requirement that (b)(2) be mutually exclusive, and since subpart (c)(4)(A) allows an action to be maintained 'with respect to particular issues,' the fact that damages are sought as well as an injunction or declaratory relief should not be fatal to a request for a (b)(2) suit, as long as the

> resulting hybrid case can be fairly and effectively managed."

Holmes v. Cont'l Can Co., 706 F.2d 1144, 1158 n. 10 (11th Cir.1983) (quoting 3B J. Moore, *Moore's Federal Practice* ¶ 23.40[4], at 23-308 (2d ed.1981)).

As with the analysis of predominance, the flawed analysis of commonality by the district court infected its consideration of a hybrid class action. If the district court determines that common issues predominate and certifies a class for damages under subsection (b)(3), the district court must consider whether to certify a class under subsection (b)(2) with respect to the employees' claim for equitable relief. The district court declined to certify a hybrid class because allowing many individual suits for liability and monetary relief followed by judicial resolution of class-wide equitable relief would be "overly cumbersome, confusing, and highly inefficient." This inefficiency dissolves if the district court determines common issues predominate and certifies a class under subsection (b)(3). The definition of the hybrid class under subsection (b)(2) would be confined to current employees of Mohawk because only those members of the employees' proposed class have standing to seek injunctive relief. *See Nix v. Fulton Lodge No. 2 of the Int'l Ass'n of Machinists & Aerospace Workers*, 452 F.2d 794, 797 (5th Cir. 1971). If the employees succeed in establishing the liability of Mohawk in their suit for damages under subsection (b)(3), the district court would consider whether to fashion equitable relief under subsection (b)(2).

IV. CONCLUSION

We VACATE the decision of the district court denying class certification and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

No. CIV.A.4:04-CV-0003-HLM

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, LORA SISSON, individually and on behalf of a class,

Plaintiffs,

v.

MOHAWK INDUSTRIES, INC.,

Defendant.

March 3, 2008

ORDER

MURPHY, District Judge.

This is a class action alleging violations of the federal and Georgia Racketeer Influenced Corrupt Organizations Acts. The case is before the Court on Plaintiffs' Motion for Class Certification [174].

I. BACKGROUND

A. Factual Background

1. The Parties

Plaintiff Shirley Jane Williams resides in Rome, Georgia. (Dep. of Shirley Jane Williams at 4, 129.) From 1999 through 2003, Plaintiff Williams was employed by Defendant, first at a printing plant and then at a warehouse. (*Id.* at 6-7, 137.) Plaintiff Williams previously worked for Crown Craft, which Defendant bought. (*Id.* at 8-9, 132-33.)

Plaintiff Bonnie Jones is a resident of Chatsworth, Georgia. (Dep. of Bonnie Jones at 3.) Plaintiff Jones has been employed by Defendant for fourteen years, most recently working as a creeler at Defendant's Caradon location. (*Id.* at 3-5; Def.'s Resp. Mot. Class Certification Ex. 11.)

Plaintiff Gale Pelfrey resides in Rome, Georgia. (Dep. of Gale Pelfrey at 4.) From 1998-2001, Plaintiff Pelfrey worked at Crown Craft, which Defendant acquired in 2001. (*Id.* at 6, 9.) After Defendant acquired Crown Craft, Plaintiff Pelfrey worked at a warehouse and then at a print plant. (*Id.* at 11-12; Def.'s Resp. Mot. Class Certification Ex. 12.) In 2002, Defendant terminated Plaintiff Pelfrey's employment for job abandonment. (Def.'s Resp. Mot. Class Certification Ex. 12; Pelfrey Dep. at 6.)

Defendant is a Delaware corporation with its principal place of business in Calhoun, Georgia. (Compl. ¶ 9.) Defendant is the second-largest carpet and rug manufacturer in the United States. (*Id.* ¶ 2.) From January 1, 1999, to the present, Defendant, through its wholly-owned subsidiaries, has employed

more than 1,000 hourly workers who are authorized to work in the United States. (Def.'s Objs. & Resps. Pls.' Second Req. Admis. No. 4; Def.'s Objs. & Resps. Pls.' First Interrogs. No. 2.)

2. Defendant's Organization

Defendant has employees in all fifty states, including Georgia. (Decl of Jerry L. Melton ¶ 9.) From 1999 through 2000, Defendant completed twelve mergers and acquisitions. (Melton Decl. ¶ 3; Dep. of Mark Dailey at 12-13.) Defendant acquired the following companies: (1) Horizon Industries; (2) Karastan; (3) American Rug Craftsmen; (4) Aladdin Mills; (4) Galaxy Carpet Mills; (5) Diamond; (6) World Carpets; (7) Newmark & James; (8) American Weavers; (9) Image Industries; (10) Durkan Patterned Carpets; and (11) Crown Craft. (Melton Decl. ¶ 3; Dailey Dep. at 12-13.) Since 2000, Mohawk has completed five mergers and acquisitions, including: (1) Dal-Tile; (2) Lees; (3) Wayntex; (4) Unilin; and (5) Columbia Flooring. (Melton Decl. ¶ 4; Dailey Dep. at 12-13.)

As a result of its rapid expansion, Defendant's operations are highly decentralized in nature. (Melton Decl. ¶ 5; Dailey Dep. at 14, 181, 198.) Consequently, primary operational and human resources responsibility for Defendant's facilities and workforce exists at the location level and the divisional level. (Melton Decl. ¶ 5; Dailey Dep. at 14-15, 181, 198.) Until 2002, Defendant's corporate human resources department primarily focused on benefits. (Melton Decl. ¶ 6.)

Since 1999, Defendant has divided its operations into divisions, each of which have separate

responsibilities and business objectives. (Melton Decl. ¶ 7.) Since 1999, Defendant has had eight principal divisions. (*Id.*) Five of those divisions are included within Plaintiffs' proposed class definition, including: (1) the Residential Division; (2) the Commercial Division; (3) the Yarn Division; (4) the Operations Division; and (5) the Home Division. (*Id.*) Defendant's other divisions include the Unilin Division, the Dal-Tile Division, and the former Padding Division, all of which are excluded from Plaintiffs' proposed class definition. (*Id.* ¶ 8.) Subject to conditions and approvals, Defendant has permitted some employees to transfer between its divisions. (Def.'s Objs. & Resps. Pls.' Second Req. Admis. No. 17.)

Defendant's Residential Division primary manufactures carpet for installation in homes and apartments. (Melton Decl. ¶ 7.a; Decl. of Michael O'Neill ¶ 3.) The Residential Division includes the operations at approximately two dozen different locations, including numerous locations that Defendant has acquired through acquisitions and mergers. (Melton Decl. ¶ 7.a; O'Neill Decl. ¶ 5.)

Defendant's Commercial Division manufactures carpet for installation in commercial buildings, such as offices and hotels. (Melton Decl. ¶ 7.b.) Plaintiffs' proposed class definition includes only a few locations within the Commercial Division. (*Id.*)

Defendant's Yarn Division manufactures yarn for use in carpet and rug manufacturing. (Melton Decl. ¶ 7.c; Decl. of Jerry Hendrix ¶ 3.) The Yarn Division includes the operations of approximately fifteen different locations within Georgia, and consists of

many locations that Defendant acquired in mergers and acquisitions. (Melton Decl. ¶ 7.c; Hendrix Decl. ¶¶ 3, 5.) In 2005, Defendant combined the Yarn Division with the Residential Division. (Melton Decl. ¶ 7.c.)

In 2005, Defendant created the Operations Division. (Melton Decl. ¶ 7.d; O'Neill Decl. ¶ 19.) The Operations Division consists of a number of shared service and support functions that previously existed primarily within the Residential Division. (Melton Decl. ¶ 7.d; O'Neill Decl. ¶ 19.) Those functions included a national transportation and distribution network, including warehouses, extrusion, and creation of carpet samples. (Melton Decl. ¶ 7.d; O'Neill Decl. ¶ 19.)

In 1999, Defendant created its Home Division by aggregating the operations of three companies Defendant had acquired: American Rug Craftsmen, American Weavers, and Newmark & James. (Melton Decl. ¶ 7.e; Decl. of Patti D. Silver ¶ 4.) In 2000, Defendant acquired Crown Craft, which in turn became part of the Home Division. (Silver Decl. ¶ 4.) Defendant's Home Division primarily manufactures products for use in homes, such as pillows, blankets, bath mats, and rugs. (Melton Decl. ¶ 7.e.) Since 1999, the Home Division has included the operations of over two dozen different locations. (Silver Decl. ¶ 5.)

Each of the five divisions at issue in the proposed class definition has its own management structure in charge of operations at each location within each division. (Melton Decl. ¶ 12.) Each division also has its own Division Director of Human Resources, who is responsible for human resources for the division. (*Id.*)

From 1999 through 2007, the Division Directors of Human Resources have reported directly to the operational management within their respective divisions. (Melton Decl. ¶ 12; O'Neill Decl. ¶¶ 4, 19; Hendrix Decl. ¶¶ 4, 19.) The Division Directors of Human Resources did not report directly to the corporate Vice President of Human Resources, but instead simply had an informal, "dotted line" relationship with that individual. (Melton Decl. ¶ 13; O'Neill Decl. ¶¶ 4, 19; Hendrix Decl. ¶ 19.) The Division Directors of Human Resources consulted with the corporate Vice President of Human Resources, but ultimately had the power to decide issues concerning hiring procedures, employee discipline, wages, and the use of temporary agencies at the division level. (Melton Decl. ¶ 13.)

Defendant also organizes some of its functions into two Groups that exist outside of the division structure. (Melton Decl. ¶ 10.) The Sales & Marketing Group handles sales to, and relationships with, Defendant's customers. (*Id.*) The Corporate Group provides shared administrative and management functions across Defendant's company, including executive management, accounts payable, accounts receivable, and information systems. (*Id.*) Hourly workers employed in the two Groups primarily are administrative and clerical employees who work in office environments. (*Id.*)

During the proposed class period, Defendant had approximately seventy-one locations within Georgia that fall within Plaintiffs' proposed class definition. (Melton Decl. ¶ 11.) Defendant assigns a unique location number to each of its locations, and uses that number to identify the location. (*Id.*) Although most

locations refer to a single physical site, a location infrequently may refer to a number of buildings that are geographically close to one another. (*Id.*) Additionally, a single physical site may have more than one assigned location number. (*Id.*) Moreover, a few location numbers do not strictly correspond to a physical location, but instead refer to a function that may be spread across a number of physical sites. (*Id.*)

3. Defendant's Hiring Practices

From 1999 through 2007, each of Defendant's divisions generally hired its own employees at its own hiring locations. (Melton Decl. ¶ 14; O'Neill Decl. ¶ 6.) Each division had its own human resources personnel, who had responsibility for hiring employees, including verifying employment eligibility and completing I-9 forms. (Melton Decl. ¶ 14.) Each division's human resources personnel reported to that division's operational management. (*Id.*) Defendant's corporate-level personnel had no responsibility for divisional employment decisions, including hiring and disciplining employees. (*Id.* ¶ 15.)

For example, from 1999 through 2005, the Residential Division maintained its own separate hiring locations for hourly employees, and conducted its hiring primarily at four county hiring centers. (O'Neill Decl. ¶ 6.) From 2005 to the present, the Residential Division has conducted its hiring at five county hiring centers, and locations within the Residential Division that fall outside those counties conduct their own hiring. (Hendrix Decl. ¶ 20.) With one minor exception, the Residential Division's hiring locations did not hire employees for Defendant's other divisions or groups. (O'Neill Decl. ¶ 6.) Human

resources personnel within the Residential Division, rather than Defendant's corporate headquarters ran the hiring centers. (O'Neil Decl. ¶ 7; Hendrix Decl. ¶ 21.) Those personnel, in conjunction with management at plants within the Residential Division, determined which applicants to hire and for which jobs and shifts. (O'Neill Decl ¶ 7; Hendrix Decl. ¶ 21.) Applicants for jobs within the Residential Division applied for jobs within that division and not for jobs with Defendant in general. (O'Neill Decl. ¶ 8; Hendrix Dec. ¶ 22.)

Employees of the Residential Division were responsible for completing I-9 forms. (O'Neill Dec. ¶ 9; Hendrix Decl. ¶ 23.) The management of the Residential Division determined whether to discipline, including whether to terminate, its hourly employees. (O'Neill Decl. ¶ 10; Hendrix Decl. ¶ 24.)

Similarly, from 1999 through 2005, Defendant's Yarn Division maintained and managed its own separate hiring locations for hourly employees, and conducted its own hiring at each of its approximately fifteen locations. (Hendrix Decl. ¶ 6.) Those hiring locations did not hire employees for Defendant's other divisions or groups. (*Id.*) The Yarn Division's personnel, including human resources personnel, ran the hiring locations and determined which applicants to hire and for which jobs and shifts. (*Id.* ¶ 7.) Applicants who sought jobs within the Yarn Division applied for jobs within that division and not for jobs with Defendant in general. (*Id.* ¶ 8.) The Yarn Division employees were responsible for competing the I-9 forms. (*Id.* ¶ 9.) The Yarn Division's management also determined whether to discipline,

including whether to terminate, the Yarn Division's hourly employees. (*Id.* ¶ 10.)

The Home Division also maintains its own separate hiring locations for hourly employees. (Silver Decl. ¶ 6.) From 1999 through 2007, the Home Division conducted its hiring for its plants in Gordon County, Georgia, at a hiring center in Calhoun, Georgia, and for its plants in Whitfield County, Georgia, at a hiring center in Dalton, Georgia. (*Id.*) Home Division plants located in Jasper and Hiawassee, Georgia, did their own hiring. (*Id.*) The Home Division's hiring locations have not hired employees for Defendant's other divisions or groups. (*Id.*) Applicants who seek jobs within the Home Division complete applications for jobs within that division, and not for jobs with Defendant in general. (*Id.* ¶ 8.)

Home Division employees ran the Home Division's hiring centers. (Silver Decl. ¶ 7.) Home Division human resources personnel operated the hiring centers in Calhoun and Dalton, while individual plant managers at the Hiawassee and Jasper plants oversaw hiring at those locations. (*Id.*) Those personnel determined which applicants to hire and for which jobs and shifts. (*Id.*) Those personnel also were responsible for completing the I-9 forms. (*Id.* ¶ 9.) The Home Division's management determines whether to discipline, including whether to terminate, its hourly employees. (*Id.* ¶10.)

Defendant generally does not take language into consideration when determining whether to hire someone for employment, unless the job requirements make it necessary for the employee to have the ability

to speak and write English. (Dep. of Matthew B. Brown Dated Aug. 30, 2007 ("Brown Dep. III) at 52, 63-64.)

Defendant contends that its human resources department follows the law with respect to completing I-9 forms, and that Defendant does not knowingly allow an employee who is not eligible to work in the United States to work for it. (Brown Dep. III at 54, 102.) Defendant uses good faith efforts to collect and maintain I-9 forms consistent with all applicable laws and regulations, and denies the remainder of the request. (Def.'s Objs. & Resps. Pls.' Second Req. Admis. No. 11.)

Defendant does not distribute materials to its human resources personnel in its different divisions concerning completing I-9 forms. (Brown Dep. III at 55-57.) Government documents, however, are available to assist in completing I-9 forms. (*Id.* at 56.) Defendant does not use the SSA's Basic Pilot System. (*Id.* at 90.)

If Defendant has questions concerning an applicant's eligibility for employment, Defendant investigates and resolves those questions before allowing the applicant to work for Defendant. (Brown Dep. III at 98-99.) Similarly, if Defendant receives information from the SSA reporting a "no match" between the employee's name and social security number, Defendant will review the employee's employment eligibility. (*Id.* at 103.) Defendant also has a practice of investigating questions and complaints concerning eligibility to work in the United States that come to Defendant's attention. (*Id.* at 100, 102-03.) Defendant, however, does not have a

written policy describing its investigation process. (*Id.* at 100.) A report presented by Plaintiffs indicates that, during the period from January 2006 through August 2006, Defendant terminated some employees for discrepancies on work documents. (Pls.' Mot. Class Certification Ex. 17.)

4. Defendant's Use of Temporary Employment Agencies

Defendant has ongoing relationships with employment agencies who supply Defendant with temporary employees ("temporary employment agencies"), and most of Defendant's day-to-day interactions with temporary employment agencies are informal and occur without a written agreement. (Dep. of Matthew Brown Dated Aug. 23, 2007 ("Brown Dep. II") at 53; Def.'s Objs. & Resps. Pls.' First Interrogs. No. 10; Dep. of Kenneth Glenn Michaels at 46-47, 50, 52; Dep. of Catherine Stuff at 11, 31; Decl. of Catherine Waring Stuff ¶ 5; Dep. of Ginger Talley at 11; Dep. of Barbara Waters at 22-24.) The decisions as to whether to use temporary employment agencies and which temporary employment agency to use generally are left to the discretion of local human resources managers, with approval from the human resources directors of their particular divisions. (Brown Dep. II at 44-45, 48, 50, 53; Def.'s Objs. & Resps. Pls.' First Interrogs. No. 10; O'Neill Decl. ¶ 16-17, 23; Hendrix Decl. ¶¶ 15-16, 28-29; Silver Decl. ¶¶ 15-16.) Specifically, since 1999, each division has had authority to determine whether, and to what extent, to use the services of temporary agencies' employees. (Melton Decl. ¶ 19; O'Neill Decl. ¶ 16-17, 23; Hendrix Decl. ¶¶ 15-16, 28-29; Silver Decl. ¶¶ 15-16.)

Each division also has authority to determine which temporary agencies to use and to enter into, and to negotiate, fee agreements with those agencies. (Melton Decl. ¶ 19; O'Neill Decl. ¶¶ 17, 23; Hendrix Decl. ¶¶ 15-16, 28-29; Silver Decl. ¶¶ 15-16; Brown Dep. II at 57-60.) Defendant's division management determines whether to discontinue use of a particular temporary agency or to discontinue the use of temporary employees for particular jobs or at particular locations. (O'Neill Decl. ¶¶ 17, 23; Hendrix Decl. ¶¶ 16, 29; Silver Decl. ¶ 16.) No one at Defendant's corporate level is responsible for temporary agency employees working within the divisions or for the divisions' relationships with temporary agencies. (Melton Decl. ¶ 20.)

Similarly, evaluations as to performance of temporary employment agencies generally occur at the division or site level. (Brown Dep. II at 68.) Such evaluations include consideration of whether the agencies are meeting their obligations to provide temporary employees who report to work on time, who are of good quality, who can perform the work they are sent to perform or learn to do so, who follow safety rules, and who do not cause high "turnover." (*Id.* at 68.)

Orders for temporary workers generally are placed by the human resources personnel, or by other supervisory personnel, at Defendant's various plants. (Michaels Dep. at 52-53, 59; Dep. of Cheryl Johannsen at 21-22; Talley Dep. at 20; Waters Dep. at 35-37; Stuff Dep. at 38, 62-63.) The temporary agencies ordinarily set the wage rates to be paid by Defendant to the temporary employees. (Michaels Dep. at 55-58; Stuff Dep. at 17-18, 70; Talley Dep. at

12-14; Johannsen Dep. at 24; but see Waters Dep. at 34 (stating that Defendant set wages to be paid to temporary employees).)

Defendant requires that the temporary employment agencies perform drug screens and background checks on the temporary employees to be provided to Defendant. (Brown Dep. II at 63, 65; Johannsen Dep. at 14-15; Michaels Dep. at 64-65; Stuff Dep. at 44, 48.) Defendant also requires that the temporary employment agencies complete I-9 forms accurately. (Brown Dep. II at 63, 79-80; Michaels Dep. at 20; Stuff Dep. at 75, 77; Waters Dep. at 24-25, 62.)

Temporary agencies send invoices to Defendant's human resources departments, generally at the divisional level. (Dailey Dep. at 233-36; Brown Dep. II at 179; Johannsen Dep. at 26; Waters Dep. at 73-74; Stuff Dep. at 39, 65-66.) Defendant's human resources employees verify the hours claimed on the invoices, and forward the invoices to Defendant's accounts payable department. (Dailey Dep. at 233-36; Brown Dep. II at 179.) Defendant's accounts payable department pays the invoices. (Dailey Dep. at 233-36; Brown Dep. II at 179.)

5. Defendant's Wage-Setting Practices

Since 1999, each of Defendant's divisions has set wages and has independently determined the wages of its hourly employees. (Melton Decl. ¶ 16; O'Neill Decl. ¶ 12, 20; Hendrix Decl. ¶¶ 12-13, 26-27; Silver Decl. ¶ 12.) Defendant and its various divisions have used Wage Progression Tables ("WPTs") to determine wages to be paid to employees. (Dep. of Matthew Brown Dated August 17, 2007 ("Brown Dep. I" at 24.)

Defendant's Residential, Commercial, and Home divisions each have their own WPTs. (Brown Dep. I at 19, 24-25, 99, 102; Melton Decl. ¶ 16.) The divisions use their respective WPTs to determine the wages to be paid to employees within those divisions for particular jobs. (Brown Dep. I at 25.) Wages paid for a given job may differ from facility to facility or from division to division. (*Id.* at 20, 47.)

The number of wage steps for each job, and the timing of the progression through those steps, differ by division. (Melton Decl. ¶ 16.) The starting and top pay rates for hourly positions differ by division, and also frequently differ between the Georgia locations within each division. (*Id.*)

The WPTs list salary grades. (Brown Dep. I at 28.) The salary grades for companies acquired by Defendant generally were in place when Defendant acquired those companies, and Defendant continued to use those salary grades after it acquired the companies. (*Id.* at 14, 28, 85; O'Neill Decl. ¶ 13; Silver Decl. ¶ 13.)

In exceptional circumstances, some managers may provide for certain employees to receive hourly rates that exceed the top rates established by the applicable WPT for the employees' positions and divisions. (Brown Dep. I at 79, 83.) Generally, however, the top rate listed on the WPT for a given job within a given division is the top rate that an employee within that division will receive for performing that job. (*Id.* at 84.)

Defendant ordinarily provides for an annual general wage increase ("GWI") to its total budget allocation for annual wages on an annual basis.

(Brown Dep. I at 29; Def.'s Objs. & Resps. Pls.' First Interrogs. No. 4.) Defendant's corporate Human Resources department establishes the annual GWI, which generally is three percent per year, and communicates that increase to the divisions. (Brown Dep. I at 67-68; Def.'s Objs. & Resps. Pls.' First Interrogs. No. 4.) Each division, in turn, decides how to implement the GWI and whether to give employees in that division the full GWI for a given year. (Brown Dep. I at 79, 108; O'Neill Decl. ¶ 14; Hendrix Decl. ¶¶ 13-14, 26-27; Silver Decl. ¶ 14.) Defendant generally anticipates that its divisions will administer the GWI as an across-the-board increase for all hour employees within that division. (Pls.' Mot. Class Certification Ex. 30 at 1.) The presidents and human resources directors of each division, however, retain the discretion to allocate the GWI as they see fit within their divisions, subject to a budgetary cap. (Def.'s Objs. & Resps. Pls.' First Interrogs. No. 4; O'Neill Decl. ¶¶ 15, 21-22; Hendrix Decl. ¶¶ 13-14, 26-27; Silver Deck ¶ 14.)

The wage rates for given job grades generally will increase with GWI. (Brown Dep. I at 67-68, 86.) Outside of GWI, Defendant makes no changes or adjustments to the wage rates for given job grades. (*Id.* at 29.)

When evaluating its wage rates, Defendant considers employee turnover and the available applicant pool. (Brown Dep. I at 133-35.) When setting wage rates for a given position, Defendant also considers factors such as the relevant labor market, the nature of the position, the skill required to perform the position, and the employee's experience and tenure. (Def.'s Objs. & Resps. Pls.'

First Interrogs. No. 4.) Wage rates for a given position generally are determined at the division level or local facility level. (*Id.*; Brown Dep. I at 13, 15.) Generally, as long as Defendant receives enough applicants to fill its positions, Defendant believes that its wages are competitive. (Brown Dep. I at 134.)

In 2002, Defendant created a corporate compensation department led by a Director of Compensation, who reports directly to Defendant's corporate Vice President of Human Resources. (Melton Decl. ¶ 17.) The corporate compensation department has not played a significant role in setting hourly wages for Defendant's employees, but instead principally has focused on the wages of salaried employees. (*Id.*) The Director of Compensation has evaluated hourly wages for administrative and clerical jobs, and has established recommended wage ranges for those positions. (*Id.* ¶ 18.) The management of each division, however, has authority to deviate from those recommended wage ranges for administrative and clerical employees. (*Id.*)

6. Defendant's Records

Defendant admits that it has records of, or is able to determine, the aggregate amount of time worked by a Georgia hourly employee within a larger time frame. (Def.'s Objs. & Resps. Pls.' Second Req. Admis. No. 8.) Defendant further admits that it has records of, or is able to determine, the aggregate amount of monetary compensation paid to a Georgia hourly employee over the course of a period of time. (*Id.* No. 9.) Defendant admits that it collected, and has maintained, the names and social security numbers,

or other government identification numbers, of its Georgia hourly workers. (*Id.* No. 13.) Additionally, Defendant has admitted that it has collected and maintained some data regarding the monetary compensation paid to Georgia hourly employees. (*Id.* No. 14.)

Since 1997, Defendant's human resources personnel have used an Infinium system, which stores human resources data concerning permanent employees. (Dep. of Mark Dailey at 224.) The information stored in that system includes the employees' names, social security numbers, job titles, hire dates, and termination dates. (*Id.* at 225.)

7. Plaintiffs' Evidence Concerning Defendant's Alleged Employment of Illegal Immigrants or Alleged Notice of Use of False Social Security Numbers or Documentation

a. Testimony of the Named Plaintiffs

i. Plaintiff Williams

Plaintiff Williams testified that her supervisor, Roy Bennett, frequently stated that he could get "illegals" to come in and do the jobs that Plaintiff Williams and her co-workers performed. (S. Williams Dep. at 14-15, 35-36, 50, 52, 53, 135, 140-41, 145-46.) Plaintiff Williams testified that after one Hyster accident, her supervisor was angry and stated: "That's why I prefer to hire illegal people. There is none of this carryings on back here, all this talking. all this stuff going on." (*Id.* at 16-17.) According to Plaintiff Williams, Mr. Bennett stated that he preferred to hire illegals. (*Id.* at 20-21, 45-47.)

According to Plaintiff Williams, Mr. Bennett reported that he had obtained twenty-three replacement workers, and claimed that the workers were illegal workers. (S. Williams Dep. at 22-23.) Plaintiff Williams also recalled her supervisor stating that he could send "Wayne" to Texas to bring back enough people to replace the whole push." (*Id.*) Plaintiff Williams testified that she reported Mr. Bennett's comments to the plant manager, who informed Plaintiff to do her job if she wanted it. (*Id.* at 146-47.) Similarly, Plaintiff Williams testified that she reported Mr. Bennett's comments to a human resources employee at her plant, and that the human resources employee told Plaintiff Williams that she needed to do her job. (*Id.* at 146-48.)

According to Plaintiff Williams, "Wayne" reported that he had been off from work because he had to go get his son, who in turn had been to Texas to bring back illegal workers. (S. Williams Dep. at 36-37, 40-41.) Plaintiff Williams recalls hearing "through the plant" that the workers were illegal. (*Id.* at 23, 43-44.) Plaintiff Williams recalls that the employees could not speak English, and believes that the employees were illegal workers because they could not speak English. (*Id.* at 47, 56-57.)

According to Plaintiff Williams, Wayne reported that two busloads of workers had arrived for Defendant, and that the workers were packed in like sardines. (S. Williams Dep. at 61-62.) Plaintiff Williams did not see a busload of illegal workers come to Defendant's facility where she worked. (*Id.* at 64.)

Plaintiff Williams also complains that Mr. Bennett called a temporary employment agency and

obtained "Mexican" workers. (S. Williams Dep. at 48-49, 128.) Although Mr. Bennett referred to some full-time employees as illegal, Plaintiff Williams does not know first-hand whether the full-time employees or the temporary employees were illegal. (*Id.* at 50-51.)

Plaintiff Williams also recalls that an employee named "Carlos" had a number of Social Security cards, driver's licenses, and a big roll of cash. (S. Williams Dep. at 19, 53-54, 153-54.) According to Plaintiff Williams, Carlos offered to cash everyone's checks. (*Id.* at 73-74, 126, 128, 153.) Plaintiff Williams testified that Carlos claimed to be an illegal worker and that Carlos contended that Mr. Bennett had knowledge of this fact and that Mr. Bennett would not do anything about it. (*Id.* at 85-86.)

Plaintiff Williams further complains that a Hispanic woman named "Maria" performed Plaintiff Williams' job, and that Plaintiff Williams' wages were cut. (S. Williams Dep. at 21.) Plaintiff Williams recalls that Maria translated for individuals whom Plaintiff Williams believed were illegal workers. (*Id.* at 28-29.) Plaintiff Williams states that she saw Maria give cards to "Mexicans," and that she heard Maria state on one occasion, "Here is your social security card." (*Id.* at 60, 65, 161-62, 175.)

Plaintiff Williams also recalls that one Hispanic employee left a plant operated by Defendant after an injury, and later came back to work for Defendant under a different name. (S. Williams Dep. at 19, 79-85, 156-57, 172.) According to Plaintiff Williams, the injured employee and Carlos both indicated that the injured employee was an illegal worker. (*Id.* at 79-80, 82-83.) Plaintiff Williams states that another

employee worked for Defendant at different facilities under different names. (*Id.* at 157-58, 172.)

ii. Plaintiff Jones

Plaintiff Jones testified that she was working at Aladdin in 1993 or 1994 when the government raided the plant for illegal workers. (Jones Dep. at 11-13, 37.) Plaintiff Jones also is aware of an audit that occurred more recently at the Caradon plant. (*Id.* at 13, 14-15.)

Plaintiff Jones complains that a number of employees had false identification documents; however, Plaintiff Jones cannot identify a specific employee or applicant who has false identification documents. (Jones Dep. at 22-23.) Similarly, Plaintiff Jones cannot identify a supervisor or hiring employee who knowingly accepted false work authorization documents or hired illegal aliens. (*Id.* at 22, 28-29.) Plaintiff Jones does not know which employees supervisors allegedly encouraged to return to the United States and to re-apply for work with Defendant. (*Id.* at 27-28.) Plaintiff Jones also is not aware of anyone with Defendant traveling to the United States border to recruit undocumented aliens, transporting undocumented aliens, making incentive payments for locating such workers, providing housing to workers, helping workers find employment with Defendant, helping applicants apply for jobs, or destroying employment eligibility documents. (*Id.* at 28-32, 44, 63, 70-72.) Plaintiff Jones complains that Defendant has more Hispanic workers than "American" workers. (*Id.* at 45.)

Plaintiff Jones states that she learned that some employees left Defendant's employ but later returned

approximately three or four months later using different names. (Jones Dep. at 13-16, 56-69, 76.) Plaintiff Jones also heard reports of illegal employees working under different names. (*Id.* at 17.)

According to Plaintiff Jones, Bobby Tucker, who was her supervisor at Aladdin in 1993, stated that he preferred to hire illegal workers. (Jones Dep. at 42, 51.) Plaintiff Jones recalled that Mr. Tucker stated that he preferred to hire illegal workers because they did their jobs and did not complain, and did not care whether they took breaks. (*Id.*)

iii. Plaintiff Pelfrey

Mr. Bennett was Plaintiff Pelfrey's supervisor in the shipping department of the print plant. (Pelfrey Dep. at 12, 16.) Plaintiff Pelfrey complains of suffering pay cuts and job transfers and seeing Hispanics performing her job. (*Id.* at 9-10, 13-14.) Plaintiff Pelfrey also contends that Mr. Bennett and the plant manager told employees that they preferred to hire illegal workers. (*Id.* at 89-90.)

Plaintiff Pelfrey has no first-hand knowledge that Defendant hired illegal aliens or individuals who were not authorized to work in the United States. (Pelfrey Dep. at 54.) Plaintiff Pelfrey heard talk in the plant indicating that an employee named "Maria" was obtaining false documents for some illegal workers, but has no first-hand knowledge of this occurring or of anyone using false documents to obtain jobs with Defendant. (*Id.* at 76-78.) Plaintiff Pelfrey has no idea whether Maria received payment for her services, but heard a rumor that Maria received kickbacks for providing documents. (*Id.* at 130, 140-42.) Plaintiff Pelfrey contends that Maria

received preferential treatment from their supervisor. (*Id.* at 141-42.)

Plaintiff Pelfrey also does not have first-hand knowledge of any of Defendant's employees helping aliens avoid detection or remain in the United States, and has no first-hand knowledge of Defendant's employees accepting false documents. (Pelfrey Dep. at 111-13.) Plaintiff Pelfrey has no first-hand knowledge of any employees of Defendant allowing immigrants to live with them. (*Id.* at 54-55, 58-59, 81-83.) Plaintiff Pelfrey suspects that some of the employees, including temporary employees, were illegal workers because the employees could not speak English. (*Id.* at 30, 43-44, 66, 69, 97.)

Plaintiff Pelfrey recalls hearing that the son of an employee named Wayne Bishop picked up illegal workers and brought those employees to work at Defendant's facilities. (Pelfrey Dep. at 30, 34, 36-37.) Plaintiff Pelfrey, however, has no first-hand knowledge of this incident. (*Id.*)

Plaintiff Pelfrey recalls working with one Hispanic individual who left Defendant's employ after an injury, but later returned to work for Defendant under a different name. (Pelfrey Dep. at 35, 38-41, 70.) Plaintiff Pelfrey recalls Hispanic workers going home and coming back to work for Defendant, but does not know whether the workers were eligible to work in the United States. (*Id.* at 72-74.)

Plaintiff Pelfrey recalls seeing a "bunch" of Social Security cards in an employee named Carlos's wallet. (Pelfrey Dep. at 30-32, 113.) Although Plaintiff Pelfrey suspects that Carlos got kickbacks for bringing in workers, she has no first-hand knowledge

that this occurred. (*Id.* at 132-35, 139-40.) Carlos, however, had lots of cash and offered to cash the employees' checks. (*Id.* at 30, 130, 132-35, 139-40.) Plaintiff Pelfrey saw Carlos bring in one worker, but also knows that some workers rode with Carlos to work. (*Id.*) Plaintiff Pelfrey does not know whether the workers who rode with Carlos were temporary employees. (*Id.*)

iv. Defendant's Documents

Plaintiffs have adduced evidence indicating that, at a June 26, 2003, human resources meeting, Defendant's human resources personnel discussed the fact that the Social Security Administration ("SSA") had sent Defendant a list of 800 social security numbers for employees that did not match the names of the employees. (Pls.' Mot. Class Certification Ex. 5 at 1.) Other evidence presented by Plaintiffs indicates that Defendant's human resources personnel forwarded the names of 400 individuals who reportedly had names and social security numbers either in Defendant's system or on their W-2 forms that did not match to the SSA's database. (*Id.* Ex. 6.) Defendant's human resources department requested that divisional human resources directors contact the employees to verify the information. (*Id.*) Plaintiffs also have presented a March 21, 2007, memorandum to Defendant's twisting plant supervisors notifying the supervisors of recent problems with invalid cards. (*Id.* Ex. 8.)

v. Wal-Mart Complaint

In June 2005, an employee of Defendant's Home division complained to Wal-Mart's ethics hotline concerning Defendant's alleged use of illegal

immigrants in a plant. (Pls.' Mot. Class Certification Ex. 9.) Wal-Mart requested that Defendant investigate the complaint and provide a report to Wal-Mart. (*Id.*)

vi. March 2006 E-Mail

In March 2006, one of Defendant's employees sent an e-mail reporting that representatives of Defendant had asked two to three Hispanic employees in each of Defendant's sites about those employees' expectations of how Defendant's operations would be affected by a rally protesting a "crackdown" on illegal immigrants. (Pls.' Mot. Class Certification Ex. 4.) The e-mail stated: "All areas felt that it would have little to no impact because: The people live paycheck to paycheck & can't afford the loss. There is a rumor in practically every Site that the 'march' is really a plot by the INS to assemble a large group of illegals, arrest them, & deport." (*Id.*)

vii. Declaration of Christina Martinez

Plaintiffs also have presented a declaration from Christina Martinez, who works as a piece goods clerk for Defendant. (Decl. of Christina Martinez ¶ 2.) According to Ms. Martinez, she has learned from her conversations with other employees that a substantial number of Defendant's employees do not have proper documentation to work in the United States. (*Id.* ¶ 3.) Ms. Martinez complains that one of Defendant's human resources employees stated that she was aware that many of Defendant's employees were not legally authorized to work in the United States, but if applicants came to Defendant with a social security number and a false identification card,

she could and would hire the applicants, and Defendant would employ the applicants. (*Id.* ¶ 4.)

Ms. Martinez further asserts that she provided translation services for November 2006 meetings concerning converting temporary employees to permanent employees of Defendant. (Martinez Decl. ¶ 5.) According to Ms. Martinez, a number of temporary employees stated that they could not convert to permanent employment because they did not have the correct documentation. (*Id.* ¶ 6.)

According to Ms. Martinez, in December 2006, she was directed to meet with an attorney for Defendant (Martinez Decl. ¶ 7.) During that meeting, the attorney informed Ms. Martinez of a lawsuit and asked her about four temporary employees. (*Id.*) Ms. Martinez informed the attorney that she understood that those employees could not legally work in the United States. (*Id.*) Ms. Martinez contends that, shortly after her meeting with Defendant's attorney's, three of Defendant's human resources employees informed her that she should not be seeking information concerning the work status of Defendant's employees, as this task was human resources' job, and stated that, if she did so again, "'it could cost you your job.'" (*Id.* ¶ 8.)

viii. *Carpenter* Action

Plaintiffs also have presented a copy of the complaint in *Carpenter v. Mohawk Industries, Inc.*, Civil Action File No. 4:07-CV-0049-HLM. (Pls.' Mot. Class Certification Ex. 35.) In that action, the plaintiff, a former supervisor at one of Defendant's plants, asserts that Defendant terminated his employment after the plaintiff notified Defendant

that some of the temporary workers at the plant were illegal immigrants.

8. Expert Evidence

a. Dr. Borjas

Plaintiffs propose to present expert testimony from George Borjas, a labor economist. (Decl. of George Borjas ¶ 1.) Dr. Borjas asserts that he has performed empirical research concerning the impact of increased immigration on wages and employment opportunities of the pre-existing work force. (*Id.* ¶ 7.) According to Dr, Borjas, standard models of economic theory reveal unambiguous implications concerning the impact of immigration-induced supply shifts on the earnings of competing workers. (*Id.* ¶ 8.) Specifically, Dr. Borjas opines that, other things being equal, an immigration-induced increase in the size of the workforce deceases the wage of competing workers. (*Id.* ¶ 9.)

According to Dr. Borjas, he prepared a 2003 paper that addressed a methodological approach to estimate the responsiveness in wages of competing workers to an immigration-induced increase in the labor supply. (Borjas Decl. ¶ 10.) According to Dr. Borjas, that paper revealed that wages during a particular decade grew slowest for those groups that experienced the largest increase in immigration, and indicated that a ten percent immigration-induced increase in the supply of workers deceased the wages of competing workers by three to four percent, (*Id.*)

Dr. Borjas opines that he can apply the econometric framework from his 2003 paper to the situation at issue in this litigation. (Borjas Decl. ¶ 11.) Dr. Borjas further states that he has used

methods to estimate the wage impact of hiring illegal immigrants by a particular firm in a similar case involving pending litigation. (*Id.*) According to Dr. Borjas, the key result from this analysis, wage elasticity, measures the responsiveness of wages to an immigration-induced increase in the supply of labor, which, in turn, can be used to calculate the damages to Plaintiffs on a class-wide basis. (*Id.* ¶ 12.) Dr. Borjas states that he is not aware of conceptual difficulties that will prevent application of those standard methodological approaches to this case. (*Id.* ¶ 13.)

Dr. Borjas opines that Defendant's alleged practice of hiring illegal immigrants would tend to depress the wages that Defendant pays its workers below what would otherwise have been observed. (Borjas Decl. ¶ 14.) Dr. Borjas discusses Defendant's wage-setting practices and wage progression tables, and opines that Defendant's approach to setting wages does not seem consistent with the wage-setting practices that one would expect to observe for a firm that attracts labor from a local pool of applicants by offering competitive wages that vary with local market conditions. (*Id.* ¶¶ 15-18.) According to Dr. Borjas, Defendant's approach to setting wages instead seems consistent with that of a firm that pays a wage that guarantees a steady supply of applicant labor from some source, not necessarily from the local labor market, and that this approach could be the result of access to a steady supply of undocumented labor that did not originate in the local labor market. (*Id.* ¶ 18.)

Dr. Borjas opines that he can apply regression analysis to estimate wage elasticity to measure

responsiveness, in percentage terms, of average hourly earnings for Defendant's employees to a percentage increase in the labor supply. (Borjas Decl. ¶ 19.) Dr. Borjas sets forth a description of this analysis, as well as a description of the analysis to be used to estimate damages. (*Id.* ¶¶ 20-21.) Dr. Borjas opines that damages for the individual class members and for the class can be established and calculated on a class-wide basis. (*Id.* ¶ 25.)

b. Daniel S. Hamermesh, Ph.D.

Plaintiffs also have presented a declaration from Dr. Daniel S. Hamermesh, who studies the demand for labor. (Decl. of Daniel S. Hamermesh ¶ 1.) Dr. Hamermesh opines that the theory of labor implies that one can expect a firm's hiring of illegal workers to reduce the total wages of the firm's legal employees. (*Id.* ¶ 2.) Dr. Hamermesh observes that the issue presented in this case is: "What happens in a labor market, and in an individual firm that employs workers in that market, when there is an increase in the supply of workers available to a particular firm in that market?" (*Id.* ¶ 4.) According to Dr. Hamermesh, the analysis of changes such as that one has become fairly standard in the study of labor markets. (*Id.* ¶ 5.) Dr. Hamermesh opines that "the exogenous increase in the supply of workers of a given type can generally have two different direct impacts on employed workers in the labor market where it occurs." (Hamermesh Decl. ¶ 5.) First, if the existing workers' hourly rates are rigid and cannot be competed down by the new workers, the demand for existing workers' services will be reduced, causing them to lose their jobs or work reduced hours. (*Id.*) Second, if wage rates are flexible, the total wages of

at least some workers in the labor market will decrease. (*Id.*)

Dr. Hamermesh further opines that the influx of workers will have a greater impact on reduced wage rates and total wages among the low-skilled legal workers "who compete most closely with a low-skilled group of illegal immigrants who are brought into a labor market." (*Id.* ¶ 7.) According to Dr. Hamermesh, the applicable literature clearly indicates that immigrants to the United States reduce the wages of lower-skilled, lower-wage native workers. (*Id.* ¶ 8.) Dr. Hamermesh opines that multiple regression analysis could be used to estimate the alleged impact of Defendant's alleged use of illegal immigrant workers on wages of its other workers. (*Id.* ¶ 11.) According to Dr. Hamermesh, using that analysis, "one can infer what the wage rates and total wages of the affected legal workers would have been had the illegal workers not been hired by the company. (*Id.* ¶ 12.)

Dr. Hamermesh further states that he believes that the theory and statistical methods of labor economics can be usefully applied to this case." (Hamermesh Decl. ¶ 13.) According to Dr. Hamermesh, with appropriate data, he or another experienced labor economist can "measure the impact of the influx of illegal workers on individual legal employees at Mohawk and on those employees as a class." (*Id.* ¶ 13.)

c. Criticisms by Defendant

i. Declaration of Finis Welch

Defendant has presented the Declaration of Finis Welch, Ph.D., in opposition to Plaintiffs' Motion for

Class Certification. (Def.'s Resp. Pls' Mot. Class Certification Ex. 15.) Dr. Welch attempts to review and comment upon Dr. Borjas' declaration and upon the declaration of Dr. Hamermesh. (Decl. of Finis Welch, Ph.D. ¶ 4.)

Dr. Welch opines that: (1) Dr. Borjas' methodology is based on an analysis that Dr. Borjas previously rejected, (Welch Decl. ¶ 6, 9-11); (2) Dr. Borjas consistently has taken the position that examining the local effects of immigration is not possible, and that attempts to do so yield results that are completely uninformative, (*id.* ¶¶ 6, 12-15); (3) Dr. Borjas repeatedly has concluded that wage impacts of immigration can only be calculated at the national level due to capital and labor mobility and immigrant location decisions, (*id.* ¶¶ 6, 16-21); and (4) Dr. Borjas has noted that some groups of workers–specifically, those with skills that differ from the skills possessed by immigrants, actually may gain from a nationwide increase in immigration, (*id.* ¶¶ 6, 42-46).

Dr. Welch complains that Dr. Hamermesh has described immigration inaccurately as an "exogenous shock," and has ignored the interconnectedness of labor markets. (Welch Decl. ¶¶ 6, 35-40.) Consequently, Dr. Welch opines that Dr. Hamermesh cannot identify, or estimate, the impact of Defendant's alleged hiring of illegal workers on the wages of Defendant's legal workers. (*Id.* ¶¶ 6, 40-41.) Dr. Welch further opines that Dr. Hamermesh's statistical methodology does not provide a reliable benchmark for making wage comparisons to Defendant's employees. (*Id.* ¶ 6; 40-41.)

Dr. Welch further opines that Defendant's own database reveals "notable variation" in the use of temporary workers across Defendant's various locations. (Welch Decl. ¶ 51.) Dr. Welch observes that Defendant has numerous vendors that supply it with temporary workers. (*Id.* ¶ 52.) Dr. Welch also notes that many of Defendant's hourly employees likely never worked at locations that used temporary employees. (*Id.* ¶ 53.)

ii. Declaration of Robert C. Divine

Defendant also has presented the Declaration of Robert C. Divine. (Def.'s Resp. Pls.' Mot. Class Certification Ex. 16.)[1] Robert C. Divine is an attorney

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[1] In a footnote in their reply brief, Plaintiffs argue that the Court should strike Attorney Devine's declaration, contending that Attorney Devine's declaration actually is a thirty-page legal brief filed in violation of the page limitations. To the extent that Plaintiffs sought to strike Attorney Devine's declaration, Plaintiffs should have filed a separate Motion to Strike or Notice of Objection to that declaration. Simply requesting affirmative relief in a footnote or the body of a reply brief is not sufficient to trigger the motions reporting system used by the Clerk's office, and a party who requests relief in this way runs a very real risk of having his or her request for relief overlooked.

In any event, the Court declines to strike Attorney Devine's declaration as a legal brief. Instead, the Court has not considered the portions of that declaration that simply appear to be legal conclusions. The Court further observes that

who practices in the area of immigration law. (Decl. of Robert C. Divine ¶¶ 1-2.) Attorney Divine previously served as the first Chief Counsel of U.S. Citizenship and Immigration Services ("USCIS"), an agency within the United States Department of Homeland Security. (*Id.* ¶ 4.) Attorney Divine also previously served as the acting director and acting deputy director of USCIS. (*Id.*)

USCIS manages the electronic employment verification system originally known as Baste Pilot and now known as E-Verify. (Devine Decl. ¶ 5.) According to Attorney Devine, Plaintiffs' proposal that they can ascertain who is "legally authorized to be employed in the United States" by having the Court order Defendant to run its employees' names through Basic Pilot or E-Verify is erroneous. (*Id.* ¶ 11.) Attorney Devine complains that neither E-Verify nor the SSA's Social Security Number Verification Service ("SSNVS") allow the types of queries that Plaintiffs propose to submit. (*Id.* ¶ 15.) According to Attorney Devine, E- Verify: (1) only allows employers to submit queries about current employees at the time of hiring of the employees; (2) does not allow queries for workers after hiring; and (3) does not allow queries for former employees or applicants who are not hired. (*Id.*) Attorney Devine also notes that although the SSNVS allows queries about existing and former employees, those queries are allowed only to ensure that the records of such employees are correct for purposes of completing Internal Revenue Service Form W-2. (*Id.*) According to Attorney

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Attorney Devine's declaration did not affect the Court's decision as to class certification.

Devine, even if the queries proposed by Plaintiffs were permissible, the responses to those inquiries would not necessarily determine which workers are authorized to work in the United States. (*Id.* ¶¶ 16-26.) Attorney Devine opines that proposed queries using private databases suffer from similar problems. (*Id.* ¶¶ 27-28.) Similarly, Attorney Devine notes that SSA no-match letters, health insurer notifications, and I-9 forms do not establish whether given workers are authorized to work in the United States. (*Id.* ¶¶ 29-30, 32-37.) Finally, Attorney Devine opines that federal law prohibits an employer from using English language proficiency to determine whether a worker is authorized to work in the United States. (*Id.* ¶¶ 38-53.)

9. Qualifications of Plaintiffs' Counsel

a. Bobby Lee Cook

Bobby Lee Cook, an attorney representing Plaintiffs, has experience representing classes in class actions, and has been approved to act as class counsel in a number of cases. (Decl. of Bobby Lee Cook ¶ 2.) Attorney Cook has presented a declaration detailing the work that he and his co-counsel have performed in this case. (*Id.* ¶ 3.) According to Attorney Cook, he has the experience and skill necessary to represent the class in this case. (*Id.* ¶ 114.)

b. John E. Floyd

Similarly, Attorney John E. Floyd, who also serves as class counsel for Plaintiffs, has submitted a declaration indicating that his law firm has handled a number of federal and Georgia RICO cases, including class action cases. (Decl. of John E. Floyd ¶

2.) Attorney Floyd states that he has experience in litigating complex cases involving RICO claims, and that he has authored several publications concerning RICO. (*Id.* ¶ 3.) Attorney Floyd also indicates that the other attorneys from his law firm who are participating in this case have prior experience with class actions. (*Id.* ¶¶ 6-9.) Attorney Floyd further provides information concerning the work that he and his co-counsel have performed in this case. (*Id.* ¶ 10.) Finally, Attorney Floyd opines that his law firm and the individual attorneys from that firm who are involved in this case have the experience and skill necessary to represent the class in this case. (*Id.* ¶ 11.)

c. Howard W. Foster

Attorney Howard W. Foster, who also serves as counsel for Plaintiffs in this case, has provided a declaration indicating that he has considerable experience in RICO actions, including experience as class counsel in RICO actions proceeding under the same legal theory at issue in this case, and that he also teaches a class regarding Civil RICO at a law school. (Decl of Howard W. Foster ¶ 2.) Attorney Foster further provides the Court with information concerning the work that he and his co-counsel have performed in this case. (Id. ¶ 3.) Attorney Foster opines that he and his firm have the experience and skill necessary to represent the class adequately in this case. (*Id.* ¶ 4.)

d. Matthew D. Thames

Finally, Attorney Matthew D. Thames, who also serves as counsel for Plaintiffs in this litigation, has submitted a declaration stating that Attorney

Thames has significant experience in litigating against carpet manufacturers on behalf of plaintiff factory workers. (Decl. of Matthew D. Thames ¶ 2.) Attorney Thames further provides information concerning the work that he has performed in this case, and states that he has the experience and skill necessary to represent the putative class adequately. (*Id.* ¶¶ 3-4.)

B. Procedural Background

On January 6, 2004, Plaintiffs filed this lawsuit. Plaintiffs are current and former hourly employees of Defendant who claim that Defendant's alleged employment and harboring of illegal aliens has depressed their wages. Plaintiffs assert the following claims: (1) a claim that Defendant's conduct violates 18 U.S.C.A. § 1962(c) (Compl. ¶¶ 88-92); (2) a claim that Defendant's conduct violates O.C.G.A. § 16-14-4(a) (*id.* ¶¶ 93-98); (3) a claim that Defendant's conduct violates O.C.G.A. § 16-14-4(c) (*id.* ¶¶ 99-105); and a claim for unjust enrichment arising under Georgia law (*id.* ¶¶ 106-110). Plaintiffs also seek certification of a class pursuant to Federal Rule of Civil Procedure 23. (*Id.* ¶ 46.)

On February 9, 2004, Defendant filed a Motion to Dismiss. Defendant requested that the Court dismiss Plaintiffs' federal and state RICO claims. Defendant also requested that the Court decline to exercise its pendent jurisdiction over Plaintiffs' state law claims.

On April 12, 2004, the Court granted in part and denied in part Defendant's Motion to Dismiss. (Order of Apr. 12, 2004.) The Court denied the Motion to Dismiss with respect to Plaintiffs' federal and Georgia RICO claims and with respect to Plaintiffs'

unjust enrichment claim relating to Defendant's wage savings in employing Plaintiffs at a reduced rate, but granted the Motion to Dismiss with respect to Plaintiffs' unjust enrichment claim relating to Defendant's savings with respect to workers' compensation claims. (*Id.*)

On May 27, 2004, the Court granted Defendant's request to certify its April 12, 2004, Order for an interlocutory appeal. (Order of May 27, 2004.) The Court also stayed discovery pending resolution of the interlocutory appeal. (*Id.*)

On June 9, 2005, the United States Court of Appeals for the Eleventh Circuit entered an Order affirming in part and reversing in part the Court's ruling on the Motion to Dismiss. *Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252 (11th Cir. 2005). The Eleventh Circuit affirmed the Court's decision with respect to Plaintiffs' RICO claims, but reversed the Court's denial of the Motion to Dismiss with respect to Plaintiffs' unjust enrichment claims based on Defendant's wage savings in employing Plaintiffs at a reduced rate. (*Id.*)

Defendant filed a petition for rehearing *en banc* with the Eleventh Circuit. On July 29, 2005, while that petition remained pending before the Eleventh Circuit, Plaintiffs filed a Motion to Lift the Stay of Discovery in this Court.

On August 8, 2005, the Eleventh Circuit denied Defendant's petition for rehearing *en banc*. On August 11, 2005, Defendant filed a Motion to Continue the Stay of Discovery Pending its Petition for Certiorari.

On August 16, 2005, the Eleventh Circuit issued its mandate in the case. On August 18, 2005, the Eleventh Circuit returned the record on appeal to the Court.

On August 18, 2005, the Court entered an Order staying discovery in this case until the Supreme Court either denied Defendant's petition for a writ of certiorari or granted Defendant's petition and decided the case on its merits. (Order of Aug. 18, 2005.) On October 7, 2005, Defendant filed a petition for certiorari with the Supreme Court, raising the following questions for review: (1) whether a defendant corporation and its agents can constitute an enterprise under RICO; and (2) whether Plaintiffs had stated proximately caused injuries to business property by alleging that the hourly wages they accepted were too low. On December 12, 2005, the Supreme Court granted certiorari as to the first question presented in the petition. *Mohawk Indus., Inc. v. Williams,* 126 S. Ct. 830 (2005).

On April 25, 2006, the Supreme Court held oral arguments in the case. On June 5, 2006, the Supreme Court dismissed the writ of certiorari limited to the first question contained in the petition for certiorari as improvidently granted, and remanded the case to the Eleventh Circuit for further consideration in light of *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). *Mohawk Indus., Inc. v. Williams,* 126 S. Ct. 2016 (2006).

On September 27, 2006, the Eleventh Circuit issued an opinion concluding that the Court properly denied Defendant's Motion to Dismiss as to Plaintiffs' federal and state RICO claims, and that

the Court improperly denied the Motion with respect to Plaintiffs' unjust enrichment claims. *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006). The Eleventh Circuit remanded the case to this Court "for further proceedings." *Id.* at 1295.

On October 9, 2006, Defendant filed a petition for rehearing *en banc*. On November 22, 2006, the Eleventh Circuit denied Defendant's petition for rehearing *en banc*. On November 30, 2006, the Eleventh Circuit issued its mandate.

On December 13, 2006, Plaintiffs filed a Motion for Discovery. Plaintiffs requested that the Court issue an Order confirming that the stay of discovery in this case had expired according to its terms and directing the parties to proceed with discovery according to the terms outlined in the March 15, 2004, scheduling order entered by the Court.

On December 19, 2006, Defendant filed a second petition for a writ of certiorari with the Supreme Court. On January 2, 2007, Defendant filed a response in opposition to Plaintiff's Motion for Discovery, arguing that the Court should stay discovery in the case until the Supreme Court denied Defendant's petition for a writ of certiorari or ruled on the merits of the case.

On January 16, 2007, the Court entered an Order denying Plaintiffs' Motion for Discovery. (Order of Jan. 16, 2007.) The Court stayed discovery in the case until the Supreme Court denied Defendant's petition for a writ of certiorari or decided the case on the merits after granting Defendant's petition. (*Id.*)

On February 26, 2007, the Supreme Court denied Defendant's second petition for a writ of certiorari.

Mohawk Indus., Inc. v. Williams, 127 S. Ct. 1381 (2007). The case subsequently was returned to this Court for further proceedings.

On March 21, 2007, Plaintiffs filed an Emergency Motion for Hearing Regarding Mohawk's Contact With Witnesses. (Docket Entry No. 85.) On April 9, 2007, the Court denied that Motion. (Order of Apr. 9, 2007.)

On March 30, 2007, Plaintiffs filed a Motion for Sanctions and to Compel as a Result of Mohawk's Presentation of an Unprepared Corporate Designee. (Docket Entry No. 95.) On that same day, Plaintiffs filed a Motion for the Entry of a Document Preservation Order. (Docket Entry No. 96.) On April 27, 2007, the Court entered an Order denying the Motion for the Entry of a Document Preservation Order as moot, as Plaintiffs' counsel indicated an intent to withdraw that Motion without prejudice. (Order of April 27, 2007.) Similarly, on May 14, 2007, the Court entered an Order denying Plaintiffs' Motion for Sanctions without prejudice after Plaintiffs withdrew the Motion. (Order of May 14, 2007.)

On May 18, 2007, Plaintiffs filed a Notice of Death of Plaintiff. (Docket Entry No. 126.) That Notice informed the Court of the death of Plaintiff Lora Sisson. (*Id.*)

On June 6, 2007, the parties filed a Joint Stipulation. (Docket Entry No. 136.) The Joint Stipulation states, in relevant part:

1. Plaintiffs allege that they are current and former hourly employees of Mohawk.

2. Mohawk has denied that it employs or has employed Plaintiffs—or any other hourly workers-within the State of Georgia. Mohawk has contended that certain subsidiaries, including but not limited to Aladdin Manufacturing Corporation, Mohawk Carpet Corporation and Mohawk ESV, Inc., have employed Plaintiffs and other hourly workers in Georgia.

3. The parties stipulate that, for purposes of this action only, no party will rely on the fact or contention that one or more Mohawk subsidiaries–rather than Mohawk itself–may have employed, paid for, or contracted for hourly workers (a) in connection with any aspect of class certification, (b) to establish or dispute any liability or violation of state or federal law, or (c) to avoid the collection of any judgment or award in this action.

4. The parties stipulate that, for purposes of this action only, no party will rely on the fact or contention that one or more Mohawk subsidiaries–rather than Mohawk itself–may have contracted with or had other dealings with temporary employment agencies, recruiting firms, and individual recruiters (a) in connection with any aspect of class certification, (b) to establish or dispute any liability or violation of state or federal law, or (c) to avoid the collection of any judgment or award in this action.

5. The parties stipulate that, for purposes of this action only, that Mohawk will assume any liability for the conduct of its subsidiaries. The parties further agree and stipulate that Plaintiffs need not and will not add any other Mohawk subsidiary as a defendant in this action.

6. For purpose of this action only, the parties stipulate that any current or former hourly employee in Georgia of any Mohawk subsidiary (including, but not limited to, Gale Pelfrey, Shirley Williams and Bonnie Jones) has standing to pursue claims for injuries to their wages against Mohawk in this action.

7. Nothing in these stipulations, however, will affect the ability of any party to rely upon other issues of corporate organization–including but not limited to Mohawk's divisional structure–(a) in connection with any aspect of class certification, or (b) to dispute any legal violation or liability.

* * *

(*Id.* ¶¶ 1-7.)

On December 10, 2007, Plaintiffs filed a Notice of Death of Plaintiff, notifying the Court of the death of Plaintiff Shirley Williams. (Docket Entry No. 169.)

On December 18, 2007, Plaintiffs filed their Motion for Class Certification. (Docket Entry No. 174.) Plaintiffs request that the Court certify the following class:

> All persons legally authorized to be employed in the United States who are or have been employed in hourly positions by Mohawk Industries, Inc., its subsidiaries or affiliates in Georgia at any time from January 5, 1999 to the present, other than Excluded Employees.
>
> Excluded Employees are employees whose employment at Mohawk has been limited to: Dal-Tile, Unilin, or any Mohawk facility or

> facilities in Milledgeville, Dublin, Tifton, Norcross, Kennesaw or Atlanta, Georgia.

(*Id.* at 1-2.) Plaintiffs seek certification of their claim for injunctive relief under Federal Rule of Civil Procedure 23(b)(2), and request that the Court certify all of their claims under Rule 23(b)(3).

Defendant opposes Plaintiffs' Motion for Class Certification. The briefing process for the Motion is complete, and the Court therefore concludes that the Motion is ripe for resolution by the Court.

II. STANDARD FOR CLASS CERTIFICATION

A. In General

Federal Rule of Civil Procedure 23 governs motions to proceed as a class action in federal court. Rule 23 requires a two-step inquiry to determine whether class certification is appropriate. Fed. R. Civ. P. 23. Plaintiffs bear the burden of satisfying each of Rule 23's certification requirements. *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 456 (11th Cir. 1996). The determination whether a plaintiff has satisfied the requirements imposed by Rule 23 is left to the discretion of the trial court. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1386 (11th Cir. 1998).

When assessing a motion for class certification, the Court ordinary does not inquire whether the plaintiffs have adduced sufficient evidence to prevail on the merits of their claims. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 456 (11th Cir. 1996). The Court, however, "performs a 'rigorous analysis' of the arguments offered in support of certifying the class."

Rhodes v. Cracker Barrel Old Country Store, Inc., 213 F.R.D. 619, 673 (N.D. Ga. 2003) (citing *Gilchrist v. Bolger*, 733 F.2d 1551, 1556 (11th Cir. 1984)).

"When performing this analysis, the Court is not limited solely to the substance of the parties' pleadings; indeed, the Court should allow–and has allowed in this case–the parties to conduct discovery and adduce evidence relevant to the class certification issue." *Rhodes*, 213 F.R.D. at 673 (citing *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570-71 (11th Cir. 1992)). As the Supreme Court has recognized, the need for such discovery varies depending on the circumstances presented by each case:

> "[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." [*Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)] (quoting *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558). Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiffs claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.

General Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982); *Hudson*, 90 F.3d at 457; *see also In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603, 610-11, 614 (N.D. Ga. 1997) ("Polypropylene I") (noting, because motion for class certification pursuant to Rule 23(b)(3) requires court to examine

whether evidence to be used by plaintiffs at trial is common to class, court must perform preliminary review of plaintiffs' proposed evidence). In sum, the Court must determine "through information submitted outside of the pleadings that the requirements of Rule 23 are met, not whether plaintiffs claims are viable." *Telecomm Technical Servs. v. Siemens Rolm Commons. Inc.,* 172 F.R.D. 532, 543 (N.D. Ga. 1997). "Stated differently, the Court will examine whether sufficient evidence exists to reasonably conclude that Plaintiffs may proceed in the manner proposed, not whether the evidence can withstand any and all factual challenges leveled by Defendant[]." *Rhodes,* 213 F.R.D. at 673.

B Evaluation of Expert Testimony

At the class certification stage, the Court "need not evaluate competing expert opinions pursuant to Federal Rule of Evidence 702 or the rule of *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786, 125 L Ed. 2d 469 (1993)." *In re Microcrystalline Cellulose Antitrust Litig.,* 218 F.R.D. 79, 83 (E.D. Pa. 2003). Indeed, at this stage of the proceedings, the Court "'should not delve into the merits of an expert's opinion, or indulge in dueling between opposing experts.'" *Fisher v. CIBA Speciality Chems. Corp.,* 238 F.R.D. 273, 281 (S.D. Ala. 2006) (quoting *In re Natural Gas Commodities Litig.,* 231 F.R.D. 171, 182 (S.D.N.Y. 2005)) (internal quotation marks omitted). The Court also "need not assign any one opinion particular weight." *In re Microcrystalline Cellulose Antitrust Litig.,* 218 F.R.D. at 83.

"An expert opinion must meet only a 'low hurdle' to receive consideration at the Rule 23 stage." *Fisher,*

238 F.R.D. at 281 (citing *In re Natural Gas Commodities Litig.*, 231 F.R.D. at 182). The Court asks only "'whether the expert evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met.'" *Id.* (quoting *Dukes v. Wal-Mart Inc.*, 222 F.R.D. 189, 191 (N.D. Cal. 2004)).

Defendant raises numerous arguments as to why Defendant believes the Court should not consider the expert testimony presented by Plaintiffs. Those arguments, however, essentially present *Daubert* challenges or challenges to the merits of the opinions offered by Plaintiffs' experts. The Court need not and does not, consider such challenges at this stage of the proceedings. Rather, the Court concludes, for the limited purposes of ruling on the instant Motion, that the expert evidence presented by Plaintiffs is sufficiently probative to be useful to the Court in determining whether Plaintiffs have satisfied the requirements for class certification. Plaintiffs' expert evidence consequently satisfies the low hurdle required at this stage of the proceedings.

C. Requirements of the Federal Rules of Civil Procedure

Before the Court may certify a case as a class action, the case must satisfy all four requirements of Federal Rule of Civil Procedure 23(a), and also must fall within one of the categories described in Rule 24(b). *Rhodes,* 213 F.R.D. at 673-74. Rule 23(a) requires Plaintiffs to show:

> (1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Plaintiffs argue that the putative class's claim for injunctive relief qualifies for certification under Rule 23(b)(2). Rule 23(b)(2) allows certification if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

Plaintiffs also claim that the putative class fits within Rule 23(b)(3). Rule 23(b)(3) requires that: (1) questions of law or fact common to members of the class predominate over questions affecting only individual members; and (2) a class action must be superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

The Court first addresses whether Plaintiffs have standing to pursue their claims. The Court then discusses Plaintiffs' showing under Rule 23(a) and, finally, discusses whether Plaintiffs have satisfied the requirements of Rule 23(b)(2) or Rule 23(b)(3).

III. STANDING

As an initial matter, Defendant contends that the named Plaintiffs lack standing to pursue their claims. The United States Court of Appeals for the Eleventh Circuit has observed:

> [I]t is well-settled that prior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim. "[A]ny analysis of class certification must begin with the issue of standing." "Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others." It is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert. Rather, "each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim."

Prado-Steiman v. Bush, 221 F.3d 1266, 1279-80 (11th Cir. 2000) (citations omitted) (alteration in original). Plaintiffs, as the parties claiming jurisdiction, have the burden of establishing standing. *Fla. Pub. Interest Research Group Citizen*

Lobby, Inc. v. Envtl. Prot. Agency, 386 F.3d 1070, 1083 (11th Cir. 2004).

"Article III of the United States Constitution limits the power of federal courts to adjudicating actual 'cases' and 'controversies.'" *Nat'l Alliance for the Mentally Ill, St. Johns, Inc. v. Bd. of County Comm'rs of Si. Johns County,* 376 F.3d 1292, 1294 (11th Cir. 2004). "The most significant case-or-controversy doctrine is the requirement of standing." *Id.* "'In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Id.* (quoting *Warth v. Seldin,* 422 U.S. 490, 498 (1975)).

To satisfy the standing requirement, a party must show: (1) that he has suffered an Injury in fact; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury "will be 'redressed by a favorable decision.'" *Bischoff v. Osceola County, Fla.,* 222 F.3d 874, 883 (11th Cir. 2000).

Here, the Court finds that at least one of the named Plaintiffs has standing to assert all of the claims advanced by Plaintiffs. Although Defendant correctly notes that the named Plaintiffs who are former employees of Defendant[2] lack standing to raise claims for injunctive relief, the evidence in the record indicates that Plaintiff Jones still is employed

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[2] Plaintiff Pelfrey is a former employee of Defendant. As previously noted, Plaintiffs Williams and Sisson passed away since the filing of this action, and thus obviously are no longer employed by Defendant.

by Defendant. See *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 665 n.13 (N.D. Ga. 2001) (observing that former employees lacked standing to seek injunctive relief). At least one named Plaintiff consequently has standing to pursue claims for injunctive relief.[3]

IV. RULE 23(A) ANALYSIS

A. Numerosity

The numerosity requirement is satisfied if the proposed class is so numerous that joinder of all members is impracticable. Fed R. Civ. P. 23(a)(1). The impracticability requirement does not require that joinder be impossible; rather, a plaintiff need only show that joinder would be extremely difficult or inconvenient. *Anderson v. Gamer*, 22 F. Supp. 2d 1379, 1384 (N.D. Ga. 1997). Additionally, a plaintiff "generally must proffer some evidence or a reasonable estimate of the number of members comprising the purported class." *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 529 (M.D. Fla. 1996).

Here, Plaintiffs allege that the class satisfies the numerosity requirement, and Defendant apparently agrees. (Def.'s Resp. Pls.' Mot. Class Certification at 1

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[3] To the extent that Defendant contends that Plaintiff Jones lacks standing to pursue claims because Plaintiff Jones worked at a facility that did not use temporary labor, this issue "is more properly one of commonality and typicality than of standing." *Reid*, 205 F.R.D. at 663 n.9. Consequently, the Court addresses that contention in connection with the commonality and typicality inquiries.

("Plaintiffs seek to represent a class consisting of 49,708 members."). The Court finds that the proposed class is sufficiently numerous to make joinder of all members extremely difficult or inconvenient.

A second element of the numerosity requirement is that the proposed class meet a minimal standard of identifiability. *Rhodes,* 213 F.R.D. at 674. Although "[i]t is not necessary that the members of the class be so clearly identified that any member can be presently ascertained, ... [Plaintiffs] must establish that there exists a legally definable 'class' that can be ascertained through reasonable effort." *Earnest v. Gen. Motors Corp.,* 923 F. Supp. 1469, 1473 & n.4 (N.D. Ala. 1996) (quotations and citations omitted). The class simply must meet a "minimum standard of definiteness which will allow the trial court to determine membership in the proposed class." *Id.*; *see also Telecomm Technical Servs.,* 172 F.R.D. at 543-44 (noting all members of class need not be specifically identified and may be dispersed geographically).

One court has noted that to meet Rule 23(a)'s requirement that the class be identifiable, "a proposed class definition must specify a particular group harmed during a particular time period via a particular manner, such that the district court can utilize objective indicia to determine who is and is not part of the class." *Fisher,* 238 F.R.D. at 301. Courts have declined to certify classes "where the proposed [class] definition would require individualized fact-finding to identify class members." (*Id.*)

Plaintiffs suggest that they can identify the members of the proposed class through Defendant's records, notifications that third parties have provided

to Defendant concerning use of social security numbers, submission of the names and social security numbers of Defendant's hourly workers to E-Verify, by reviewing I-9 forms, and by using databases such as Lexis-Nexis or People Finder. Defendant devotes a significant amount of time and energy to contending that those methods will not allow Plaintiffs or the Court to identify the members of the proposed class. The Court, however, finds at this point, and solely for purposes of the instant Motion, that the alleged deficiencies pointed out by Defendant do not cause the proposed class to fail the "minimal" standard of ascertainability.

In sum, the Court finds that the proposed class satisfies the numerosity requirement. The Court further concludes that the proposed class meets the minimal standard of identifiability required by Rule 23(a).

B. Commonality

To satisfy the commonality requirement, a plaintiff must show the presence of questions of law or fact common to the entire class. Fed. R. Civ. P. 23(a)(2). Stated differently, Rule 23(a)(2) requires a plaintiff to demonstrate the existence of issues subject to class-wide proof. *Hudson*, 90 F.3d at 457, "[W]hile it is not necessary that every question of law or fact is common to every class member, commonality will not exist as long as there is a predominance of individual issues." *Domestic Air,* 137 F.R.D. at 699 (citing 3 Herbert B. Newburg, *Newburg on Class Actions* § 18.09, at 464 (2d ed. 1985)).

Here, Plaintiffs argue that several questions of fact and law are common to the proposed class. In

particular, Plaintiffs contend that the common questions at issue in this case include:

(1) *Enterprise*: Has Mohawk conducted or participated, directly or indirectly, in the conduct of an enterprise's affairs? What are the nature and extent of the relationships between Mohawk and the third parties that supply Mohawk with illegal workers?

(2) *Pattern of Racketeering Activity*: Has Mohawk engaged in a pattern of racketeering activity? How many persons who are not authorized to be employed in the United States has Mohawk employed in hourly positions in Georgia during the Class Period? Did Mohawk knowingly hire those unauthorized aliens? How many aliens has Mohawk harbored during the Class Period? Did Mohawk knowingly or recklessly harbor those aliens? Has Mohawk knowingly or recklessly encouraged or induced aliens to come to or reside in the United States? Has Mohawk knowingly accepted false employment authorization documents? Has Mohawk knowingly used false identification documents?

(3) *Conspiracy*: Has Mohawk engaged in a conspiracy to violate § 16-4-4(a) of the Georgia RICO statute?

(4) *Injury*: To what extent has Mohawk's pattern of racketeering activity depressed the wages of the class members and/or increased or maintained Mohawk's profits?

(5) *Injunctive Relief*: What injunctive relief is required to remedy Mohawk's violations of the federal and Georgia RICO statutes?

(Pls.' Br. Supp. Mot. Class Certification at 15-16.)

For the following reasons, the Court concludes that this case does not satisfy the commonality requirement. Contrary to Plaintiffs' arguments that Defendant engaged in one grand conspiracy to employ illegal workers, the evidence in the record indicates that Defendant's operations, including its use of temporary employment agencies and wage-setting practices, are extremely decentralized. Indeed, the evidence shows that Defendant's corporate-level management, including its human resources department, did not enter into relationships with temporary agencies or even exercise control over those relationships, and did not exercise control over wages. Instead, the evidence in the record demonstrates that each of Defendant's five divisions at issue in this case conducted its own hiring, entered into its own relationships with various temporary employment agencies, and had discretion and autonomy to choose whether to enter into such relationships and to set the terms of the relationships. The record further demonstrates that each division set its own wages for its non-temporary hourly employees. The record also shows that some locations within divisions even conducted their own hiring, and that the management at those locations had discretion to choose whether to use temporary employees or to engage in relationships with temporary employment agencies. The evidence thus reveals that the relationships with the various temporary employment agencies occurred on a division-by-division or facility-by-facility basis, rather than on a corporate-level basis. Under those circumstances, the Court finds that Plaintiffs have

failed to satisfy the commonality requirement. *See Reid*, 205 F.R.D. at 669-70 (noting that plaintiffs in employment discrimination suit failed to satisfy commonality requirement where evidence indicated that employment practices were established at local level in various facilities); *see also Cooper v. S. Co.*, 390 F.3d 695, 715 (11th Cir. 2004) (stating courts frequently have declined to certify class actions where "class certification was sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations"); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541 (N.D. Ala. 2001) (observing, in discrimination case, that plaintiffs who were employed in different stores, in different states, in different departments, and at different levels within company hierarchy did not have claims that were susceptible to generalized proof or defenses).[4]

C. Typicality

The typicality requirement is satisfied if the claims and defenses of the representative parties are

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[4] Plaintiffs argue that the Court should treat this case differently because it is a RICO action, rather than an employment discrimination case. The Court understands and appreciates Plaintiffs' argument. The Court, however, cannot simply ignore the evidence in the record, which fails to support Plaintiffs' contention that Defendant engaged in a corporate-wide RICO enterprise with temporary employment agencies to employ illegal workers and thereby depress the wages of workers who were eligible for employment in the United States.

typical of the claims and defenses of the class. Fed R. Civ. P. 23(a)(3). A representative plaintiffs claim is typical if "the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). Stated differently, the Court simply inquires whether the named representative's claims "have the same essential characteristics as the claims of the class at large.'" *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985). "Typicality, however, does not require identical claims or defenses. A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class." *Kornberg*, 741 F.2d at 1337. Furthermore, "[differences in the amount of damages between the class representative and other class members does not affect typicality." *Id.* A plaintiff thus can satisfy the typicality requirement "even though varying fact patterns support the claims or defenses of individual class members, or there is a disparity in the damages claimed by the representative parties and the other members of the class." *Domestic Air*, 137 F.R.D. at 698 (quoting 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure*: Civil § 1764 (2d ed. 1986)). "However, 'there must be a nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class.'" *Wright*, 201 F.R.D. at 543 (quoting *Kornberg*, 741 F.2d at 1337).

For the following reasons, the Court finds that Plaintiffs have failed to satisfy the typicality requirement. First, Plaintiff Jones never worked at a facility owned by Defendant that used temporary labor. Plaintiff Jones' claims thus are not typical of the claims of members of the proposed class, many of whom may have worked at facilities owned by Defendant that used temporary labor.

Additionally, both Plaintiff Jones and Plaintiff Pelfrey worked at only a handful of Defendant's facilities that Plaintiffs seek to include in the class definition. As previously noted, the evidence in the record indicates that decisions as to the use of temporary labor, as to agreements with temporary employment agencies, and as to wage-setting were made by the various divisions or even on a facility-by-facility basis. Under those circumstances, the Court simply cannot find that the named Plaintiffs' claims are typical of those of the members of the proposed class at large. *See Cooper*, 390 F.3d at 714-15 (noting that district court did not abuse its discretion in concluding that plaintiffs failed to satisfy typicality requirement where compensation and promotion decisions were made by individual managers in disparate location, and where plaintiffs sought to represent very broad class that purported to represent all African-American employees of defendants, even though named plaintiffs, collectively, did not have claims that would have been typical of entire class); *Wright*, 201 F.R.D. at 544-45 (finding typicality requirement was not satisfied where class representatives worked in only six of 125 to 160 stores, warehouses, and service centers,

located throughout fifteen states, that plaintiffs sought to include in class certification).

Finally, Plaintiff Pelfrey fails the typicality requirement with respect to her claims for injunctive relief. As previously noted, Plaintiff Pelfrey lacks standing to seek injunctive relief. Under those circumstances, Plaintiff Pelfrey does not meet the typicality requirement with respect to her claims for injunctive relief. *Franze v. Equitable Assurance*, 296 F.3d 1250, 1254 (11th Cir. 2002) ("'[w]ithout individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class,'") (quoting *Piazza v. Ebsco Indus.*, 273 F.3d 1341, 1345 (11th Cir. 2001)) (alteration in original).

In sum, the Court concludes that Plaintiffs have failed to satisfy the typicality requirement of Rule 23(a). The Court next discusses Rule 23(a)'s adequacy requirement.

D. Adequacy

To satisfy the adequacy requirement Plaintiffs must show that they will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(b)(4). This requirement involves a two-part inquiry: (1) whether the proposed class' counsel possesses the qualifications and experience to conduct the litigation; and (2) whether Plaintiffs possess interests that are antagonistic to the interests of other class members. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987); *Telecomm Technical Servs.*, 172 F.R.D. at 543-44. The Court addresses those questions in turn.

Defendants do not contest the qualifications of proposed class counsel. Proposed class counsel have considerable experience in class action litigation, and their performance in the litigation to date indicates that proposed class counsel possess the necessary qualifications and experience to conduct the litigation. The Court therefore concludes that Plaintiffs satisfy the first element of the adequacy requirement of Rule 23(a)(4).

"The adequacy requirement also serves to 'uncover conflicts of interest between named parties and the class they seek to represent.'" *Wright*, 201 F.R.D. at 545 (quoting *Robinson v. Sears, Roebuck & Co.*, 111 F. Supp. 2d 1101, 1124 (E.D. Ark. 2000)). "'A class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Id.* (quoting *Robinson*, 111 F. Supp. 2d at 1124). Further, "class representatives should have 'the personal characteristics and integrity necessary to fulfill the fiduciary role of class representatives.'" *Id.* (quoting *Kirkpatrick*, 827 F.2d at 726).

Defendant argues, among other things, that the named Plaintiffs are not adequate class representatives because the named class members lack sufficient knowledge and understanding of the nature of this action and the facts underlying this action. The Court has reviewed the depositions of each of the named Plaintiffs, and cannot find that the named Plaintiffs lack sufficient knowledge of the facts underlying this action or sufficient understanding of the facts underlying this action to be adequate representatives. The Court therefore rejects this argument.

Defendant further contends that Plaintiff Pelfrey is not an adequate representative with respect to Plaintiffs' claims for injunctive relief, as Plaintiff Pelfrey is no longer employed by Defendant. *See Wright,* 201 R.D. at 546 (finding plaintiffs failed to satisfy adequacy requirement, partly because none of plaintiffs were current employees of defendant and had no ties to defendant or prospect of benefit from injunctive relief plaintiffs were seeking). While this argument has merit, Plaintiff Jones remains employed by Defendant, and she has standing to seek injunctive relief. The Court therefore cannot find that Plaintiffs fail the adequacy requirement based on this argument

For the reasons discussed above, the Court finds that Plaintiffs' counsel possess the qualifications and experience necessary to conduct this litigation, and that the named Plaintiffs are adequate class representatives. The Court therefore concludes that Plaintiffs satisfy the adequacy requirement.

E. Summary

In sum, the Court finds that Plaintiffs satisfy the numerosity and adequacy requirements of Rule 23(a). The Court, however, concludes that Plaintiffs cannot satisfy Rule 23(a)'s commonality and typicality requirements. The Court therefore cannot certify this case as a class action, because Plaintiffs have failed to satisfy all of the requirements of Rule 23(a). In an abundance of caution, however, the Court will discuss whether Plaintiffs can satisfy the requirements of Rule 23(b)(2) or Rule 23(b)(3).

IV. RULE 23(B) ANALYSIS

In addition to satisfying all of the criteria of Rule 23(a), Plaintiffs must meet the requirements set forth in Rule 23(b). Here, Plaintiffs seek to certify their claims for injunctive relief under Rule 23(b)(2), and also seek to certify their claims under Rule 23(b)(3). Plaintiffs thus seek to certify a "hybrid" class action. *Reid*, 205 F.R.D. at 686 (describing "hybrid" class action as action in which plaintiffs sought to certify their claims for injunctive relief under Rule 23(b)(2) and their claims for damages under Rule 23(b)(3)). The Court first addresses Plaintiffs' request for class certification under Rule 23(b)(2), and then addresses Plaintiffs' request for class certification under Rule 23(b)(3).

A. Rule 23(b)(2)

Class certification is appropriate under Rule 23(b)(2) when the plaintiffs satisfy the requirements of Rule 23(a) and the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Subsection (b)(2) class actions are 'limited to those class actions seeking preliminary injunctive or corresponding declaratory relief." *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998) (quoting 1 Newburg, *supra*, at 4-39).

Here, Plaintiffs seek injunctive relief for only one of their three remaining claims–their claim for Defendant's alleged violation of O.C.G.A. § 16-14-4(a). (Compl. ¶¶ 97-98.) Plaintiffs, however, also request an award of treble damages, plus an award of

punitive damages, in connection with that same claim. (*Id.* ¶¶ 95-96.) Similarly, Plaintiffs request treble and punitive damages in connection with their claims for alleged violations of 18 U.S.C.A. § 1962(c) and O.C.G.A. § 16-14-4(c). (*Id.* § XII (prayer for relief)).

Punitive damages and treble damages are "legal relief that can only be awarded in a Rule 23(b)(2) class action when the damages sought are 'incidental' to the claims for equitable and declaratory relief." *Cooper*, 390 F.3d at 720 (quoting *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001)). "Damage claims in a Rule 23(b)(2) class action must be incidental to the equitable and declaratory relief because the basic premise of such a class action–that class members suffer a common injury properly addressed by class-wide equitable relief–'begins to break down when the class seeks to recover... monetary relief to be allocated based on individual injuries.'" *Id.* (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998)). In *Murray*, the United States Court of Appeals for the Eleventh Circuit adopted the position of the United States Court of Appeals for the Fifth Circuit in *Allison*:

> By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.... Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established.... Liability for incidental damages should not...entail complex individualized determinations. Thus, incidental damages will,

> by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

Murray, 244 F.3d at 812 (quoting *Allison*, 151 F.3d at 415) (emphasis in original; omissions in original). "In keeping with the requirement that monetary damages be incidental to equitable relief in Rule 23(b)(2) class actions, the advisory committee's note to Rule 23 explains that certification under section (b)(2) is *not* proper in 'cases in which the appropriate final relief relates exclusively *or predominately* to money damages.'" *Cooper*, 390 F.3d at 720-21 (emphasis in original).

Applying the rule set forth in *Cooper*, it is clear that the monetary damages sought by Plaintiffs are not simply incidental to the injunctive relief sought by Plaintiffs, indeed, Plaintiffs primarily seek monetary damages. Consequently, certification under Rule 23(b)(2) is inappropriate.

To the extent that Plaintiffs contend that the Court simply may certify only Plaintiffs' claims for injunctive relief under Rule 23(b)(2), this approach also is inappropriate. As another judge in this District has noted, the Seventh Amendment may prohibit such an approach. *Reid*, 205 F.R.D. at 686. As the *Reid* court observed:

> The Seventh Amendment preserves the right to a jury trial "in Suits at common law." Although the amendment specifically mentions suits at law, the Supreme Court has made clear that the right to jury trial applies in any suit "in which legal rights [are] to be ascertained and determined, in

> contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered."

Id. (citations omitted) (alterations in original). The *Reid* court concluded that a jury trial was required with respect to the plaintiffs' claims for damages because the parties in *Reid* had the right to a jury trial in a Title VII case seeking both compensatory and punitive damages, and because both sides had demanded a jury trial. *Id.* The *Reid* court noted:

> Many of the factual issues relevant to Plaintiffs' damages claims, however, are also relevant to Plaintiffs' equitable claims. As such, the litigants have the right to a determination of these issues by a single jury. Adjudication would therefore require one jury to resolve the many individual and case-specific issues relating to Plaintiffs' employment discrimination claims prior to any ruling by the court with regard to equitable remedies. The court finds that such a task would be overly cumbersome and would result in litigation characterized by confusion and incoherency.

205 F.R.D. at 686-87.

In the instant case, Plaintiffs have a right to a jury trial on their claims for damages, and they have demanded a jury trial on those claims. (Compl. § XIII E (Prayer for Relief).) Consequently, a jury trial is required with respect to Plaintiffs' claims for damages. Here, as in *Reid*, many of the factual issues relevant to Plaintiffs' damages claims also are

relevant to Plaintiffs' claim for injunctive relief, and the parties have the right to have a single jury determine those issues. The Court agrees with the *Reid* court that employing an approach whereby one jury would resolve all of the many individual and case-specific issues relating to Plaintiffs' claims before the Court issued a ruling as to equitable remedies would be overly cumbersome, confusing, and highly inefficient. The Court consequently declines to adopt the approach suggested by Plaintiffs.

Additionally, even if the named Plaintiffs were willing to forego class certification with respect to damages to pursue injunctive relief on behalf of the class, it is far from clear that the named Plaintiffs would represent the interests of the other class members adequately. *Cooper*, 390 F.3d at 721. As the Eleventh Circuit recognized in *Cooper*, "the monetary damages requested might be of far greater significance than injunctive relief for many of the class members, especially for those who no longer work for Defendant. *Id.* For those reasons, the Court will not certify a class only as to Plaintiffs' claim for injunctive relief.

In sum, the Court finds that Rule 23(b)(2) certification is inappropriate because Plaintiffs' claims for monetary damages are not simply incidental to Plaintiffs' claim for injunctive relief. The Court further concludes that certification of only Plaintiffs' claims for injunctive relief under Rule 23(b)(2) is inappropriate. The Court therefore denies Plaintiffs' request for certification under Rule 23(b)(2).

B. Rule 23(b)(3)

Rule 23(b)(3) raises two questions: (1) whether issues of law or fact common to members of the class predominate over questions affecting only individual members; and (2) whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ, P. 23(b)(3) states:

> The matters pertinent to the findings [of predominance and superiority] include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in management of a class action

Id. The Advisory Committee's notes emphasize that Rule 23(b)(3) is designed for cases "in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* advisory committee's notes to the 1966 Revision of Rule 23(b)(3) (reprinted in 39 F.R.D. 69, 102-03 (1966)). Before reaching these issues, however, the Court must identify the substantive law governing Plaintiffs' claims.

A. Substantive Law Governing Claims

1. Federal RICO Claims

The Eleventh Circuit set forth a thorough summary of the law governing Plaintiffs' federal RICO claims in its previous opinion in this case. In the interest of brevity and efficiency, the Court incorporates that portion of the Eleventh Circuit's opinion into this Order, and will not repeat that portion of the opinion, or set forth an entirely new section summarizing the applicable law governing Plaintiffs' RICO claims, in this Order. *Williams*, 465 F.3d at 1282-92.

2. Georgia RICO Claims

Similarly, the Eleventh Circuit's previous opinion in this case sets forth a thorough summary of the law governing Plaintiffs' Georgia RICO claims. In the interest of brevity and efficiency, the Court again incorporates that portion of the Eleventh Circuit's opinion into this Order, rather than repeating that portion of the opinion or setting forth an entirely new section summarizing Georgia RICO law in this Order. *Williams*, 465 F.3d at 1292-94.

B. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). A plaintiff may satisfy this requirement by showing that issues subject to class-wide proof predominate over issues requiring proof that is unique to the individual class members. *Jackson v. Motel 6*

Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir. 1997).

In deciding this question, the Court must keep in mind two related purposes of class action litigation: (1) promoting economies of time, effort, and expense; and (2) providing individuals with relatively small claims the opportunity to assert their rights. Fed. R. Civ. P. 23(b) advisory committee's notes to the 1966 Revision of Rule 23(b)(3); *Amchem*, 521 U.S. at 617 ("the Advisory Committee [in drafting Rule 23(b)(3)] had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'"). If common questions do not predominate, however, no economies will be achieved through the use of the class action device. Fed. R. Civ. P. 23(b)(3) advisory committee's notes to the 1966 Revision of Rule 23(b)(3).

The predominance requirement "does not require that all issues be common to all parties," rather, it mandates that "'resolution of the common questions affect all or a substantial number of the class members.'" *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1022 (5th Cir. 1992) (quoting *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986)). "Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1234 (11th Cir. 2000) (citing *Amchem*, 521 U.S. at 623). The Eleventh Circuit has warned that "'serious drawbacks to the maintenance of a class action are presented where initial determinations, such as the

issue of liability vel non, turn upon highly individualized facts.'" *Id.* at 1235-36 (quoting *McCarthy v. Kleindienst,* 741 F.2d 1406, 1415 (D.C. Cir. 1984)).

"Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/Master Money Antitrust Litig.,* 280 F.3d 124, 139 (2d Cir. 2001) (citing *Bertulli v. Indep. Ass'n of Cont'l Pilots,* 242 F.3d 290, 290 (5th Cir. 2001); *accord Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy") (quoting in *In re Teletronics Pacing Sys., Inc.*, 172 F.R.D. 271, 288 (S.D. Ohio 1997)).

Although "the presence of commonality alone is not sufficient to fulfill Rule 23(b)(3)...'[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.'" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (quoting 7A Wright, Miller & Kane, *supra*, § 1778); *accord Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1999) "In order to 'predominate,' common issues must constitute a significant part of the individual cases.'") (quoting *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986)). "Common issues will not predominate over individual questions

if, 'as a practical matter, the resolution of... [an] overarching common issue breaks down into an unmanageable variety of individual legal and factual issues.'" *Cooper,* 390 F.3d at 722 (quoting *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1023 (11th Cir. 1996)) (omission and alteration in original).

Here, the resolution of the common issues that Plaintiffs claim exist will, by necessity, break down into an unmanageable number of individual legal and factual issues. As previously noted, the evidence in the record fails to support a determination that Defendant engaged in a relationship with the various temporary employment agencies at a corporate-wide level. Rather, the evidence indicates that: (1) the individual divisions, and, in many cases, the individual facilities, had discretion to determine whether to enter into relationships with temporary employment agencies, to determine which of the various temporary employment agencies to use, and to determine whether to use temporary labor at all; (2) Defendant's corporate-level management had little control over the relationships between the divisions or facilities and the temporary employment agencies; (3) many facilities may have chosen not to use temporary labor at all during the proposed class period; (4) the divisions each operated their own hiring centers and made their own decisions with respect to employee hiring and discipline; (5) the divisions, rather than Defendant's corporate management, established wages for their hourly employees; and (6) the wages for the hourly employees differed from division to division, and, often, from facility to facility for the same position. To determine whether a RICO

enterprise existed, the Court will have to examine each of the relationships between the divisions or facilities and the various temporary employment agencies. Additionally, although the Court need not, and does not, evaluate the merits of Defendant's statute of limitations argument at this point, it is highly likely that the Court will have to engage in fact-specific inquiries as to each member of the class, or as to each facility or division, to evaluate this argument. Under those circumstances, the Court cannot find that common issues predominate over individual inquiries.

For the reasons discussed above, the Court finds that individual factual issues and inquiries predominate over any common issues that this case may present. The Court therefore concludes that Plaintiffs have failed to satisfy Rule 23(b)(3)'s predominance requirement. Class certification under Rule 23(b)(3) consequently is inappropriate.

C. Superiority

Plaintiffs seeking certification of a class under Rule 23(b)(3) also must show "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). When determining whether a case satisfies the superiority requirement, the Court should consider:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;

> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action,

Id. The Court discusses those factors in turn.

First, the individual class members likely have little, if any, interest in pursuing separate actions against Defendant. Second, to the Court's knowledge, the instant action and the related *Carpenter* action are the only cases filed that involve allegations of Defendant's alleged hiring of illegal workers. Third, this case has been pending before the Court for more than four years, and the Court already has supervised class discovery in the case and ruled on a Motion to Dismiss. Defendant also has its headquarters in this Division, and many of the potential class members reside in or near this Division. Under those circumstances, these three factors counsel in favor of finding that Plaintiffs have satisfied the superiority requirement.

The fourth factor, however, tips the scales in favor of concluding that Plaintiffs have failed to satisfy the superiority requirement. As previously noted, resolution of the issues involved in this case will, by necessity, break down into an unmanageable number of individual legal and factual issues. Given this concern, and given the Court's finding that common

issues do not predominate, the Court concludes that a class action is not superior to other available methods for adjudicating this controversy. The Court therefore finds that Plaintiffs have failed to satisfy the superiority requirement of Rule 23(b)(3). The Court consequently cannot certify this case as a class action under Rule 23(b)(3).

V. CONCLUSION

ACCORDINGLY, the Court DENIES Plaintiffs' Motion for Class Certification [174]. *This Order is not intended for publication.*[5]

IT IS SO ORDERED, this the 3rd day of March, 2008.

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[5] The Court has learned that certain of its Orders in other cases are available on Westlaw. The Court did not authorize the publication of many of those Orders, and the Court and its staff were not contacted prior to the publication of many of those Orders. The Court does not routinely make its Orders available on Westlaw or LEXIS, and would not ordinarily have chosen to publish many of the Orders attributed to this Court that are now available on Westlaw. The Court does not intend to authorize the instant Order for publication, and expects counsel to abide by this decision. The Court expects counsel or individuals who seek to publish the Court's Orders to consult the Court prior to sending the Orders to Westlaw, LEXIS, or any other similar legal-related publisher.

UNITED STATES DISTRICT JUDGE

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(2)

No. 09-248

Supreme Court, U.S.
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In The
Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSION, individually and on behalf of a class,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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7AA Charles Alan Wright and Arthur R. Miller, et al., FEDERAL PRACTICE AND PROCEDURE, § 1785 (2009) 23

INTRODUCTION

This is Petitioner Mohawk Industries, Inc.'s third Petition for Certiorari in this case. In plain disregard of this Court's standards for granting certiorari, Mohawk has sought the writ all three times the court of appeals has ruled against it. In this third Petition, the Question Presented is whether a district court abuses its discretion by looking beyond the pleadings to rule on a class certification motion. But the Petition goes on to acknowledge that this Court answered that question in *General Telephone Co. of the Southwest v. Falcon*, by holding that a district court "may . . . probe behind the pleadings before coming to rest on the [class] certification question." 457 U.S. 147, 160-61 (1982), quoted at Pet. at 11. Because the lower courts are all bound to follow *Falcon*, there is no circuit split over whether a district court may look beyond the pleadings in assessing a class certification motion. Accordingly, there is no "compelling reason" for this Court to grant certiorari. Sup. Ct. R. 10.

In addition, Mohawk's third Petition asks this Court to review an appellate decision that is interlocutory in nature and modest in scope. The Eleventh Circuit merely reversed the district court's denial of class certification and remanded for further class certification proceedings. The Eleventh Circuit's Opinion offers no departure from the rule settled in *Falcon* and takes no sides in any supposed circuit split. Instead, the court of appeals held that the district court abused its discretion by erroneously

applying Title VII precedents in a RICO case, not by looking beyond the pleadings. Accordingly, this case simply does not implicate whatever divisions there may be about class certification in the lower courts.

Moreover, because the case has been remanded for further class proceedings, there is not even a certification decision for this Court to review. As a result, this appeal would be a poor vehicle to address any question on which the Petition seeks certiorari.

ADDITIONAL STATEMENT OF THE CASE

The Petition's Statement of the Case hardly does justice to the five-year history of this litigation or even the class certification proceedings. Pursuant to Supreme Court Rule 15.2, Plaintiffs submit this additional statement:

1. Plaintiffs are current and former hourly employees in Mohawk's north Georgia carpet mills. Plaintiffs allege that Mohawk has engaged in the widespread hiring and harboring of illegal workers in violation of the federal and Georgia RICO statutes.[1] Plaintiffs allege that this conduct injured them by depressing the hourly wages Mohawk paid them.

After Plaintiffs filed their Complaint in January 2004, Mohawk moved to dismiss. The parties spent

[1] Pet. App. at 1a-3a.

the next three years litigating that motion. In *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (11th Cir. 2005) (*per curiam*) ("*Williams I*"), the Eleventh Circuit affirmed that plaintiffs had properly stated their federal and Georgia RICO claims.

On December 12, 2005, this Court granted certiorari to review whether a defendant corporation and its agents may constitute an enterprise under the federal RICO statute.[2] After an oral argument in which Mohawk's counsel was forced to concede that Mohawk had waived the enterprise argument it was urging on the Court,[3] however, the Court dismissed certiorari as improvidently granted.[4] In addition, the Court granted certiorari, vacated *Williams I* and remanded for reconsideration in light of *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). Upon reconsideration, the Eleventh Circuit again held that the plaintiffs had properly pleaded their federal and state RICO claims.[5] The court of appeals denied Mohawk's petition for rehearing,[6] and this Court

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[2] *Mohawk Industries, Inc. v. Williams*, 546 U.S. 1075 (2005).

[3] *See* Transcript Oral Argument, No. 05-465 at 10 (Apr. 26, 2006).

[4] *Mohawk Industries, Inc. v. Williams*, 547 U.S. 516 (2006).

[5] *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006) (*per curiam*) ("*Williams II*"); Pet. 3a-4a.

[6] Pet. App. at 59a.

denied a second Petition for Certiorari on February 26, 2007.[7]

2. Upon remand to the district court, the parties conducted class discovery but no merits discovery. In fact, the district court's March 15, 2004 discovery order prohibited any merits discovery unless and until a class was certified. Mohawk repeatedly invoked that limitation to avoid answering plaintiffs' discovery requests and to avoid producing any documents concerning the employment eligibility of its work force. The temporary employment firms that had provided Mohawk with temporary workers in North Georgia similarly invoked the prohibition on merits discovery to avoid producing documents and answering deposition questions. Accordingly, the Petition's suggestion that plaintiffs have received all the discovery they asked for in this case is not accurate.

3. Despite the prohibition on merits discovery, the available record contradicts the Petition's claim that discovery did not reveal a "shred" of evidence to support plaintiffs' claims or class certification. The district court's class certification order acknowledges significant evidence that Mohawk knowingly hires and harbors illegal workers in violation of the federal and Georgia RICO statutes.[8] For example, Mohawk

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[7] *Mohawk Industries, Inc. v. Williams*, 549 U.S. 1260 (2007); Pet. App. at 59a-60a.

[8] *See* Pet. App. 38a-47a.

documents revealed that Mohawk's managers were concerned that an immigration march to protest crackdowns on illegal hiring might interrupt Mohawk's operations. In a March 2006 e-mail, however, Mohawk's managers reported that there was nothing to worry about because a survey of "two to three Hispanic employees in each of [Mohawk's] sites" revealed that Mohawk's employees were too scared to attend the march for fear of being rounded up and deported:

> All areas felt that it [the march] would have little to no impact because: The people live paycheck to paycheck & can't afford the loss. ***There is a rumor in practically every Site that the "march" is really a plot by the INS to assemble a large group of illegals, arrest them, & deport***.[9]

The district court further recounted that the Social Security Administration ("SSA") had notified Mohawk that hundreds of Mohawk employees had presented social security numbers that did not match the names in the SSA's databases.[10]

The district court also noted that Norman Carpenter, a former Mohawk supervisor, had filed a complaint alleging that Mohawk had fired him for reporting that "about 90% of the temporary workers on his Shift did not have proper documentation to

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[9] *Id.* at 45a (emphasis added).

[10] *Id.* at 44a.

work in the United States." Carpenter claims that Mohawk's corporate managers and its outside counsel demanded that he retract his allegation because it would harm Mohawk's defense in this case. When Carpenter refused, he claims Mohawk fired him on the false allegation that he – not Mohawk – was violating the immigration laws.[11]

The district court further noted the declaration of Christina Martinez, a current Mohawk employee, who testified that a member of Mohawk's Human Resources staff admitted "she was aware that many of Defendant's employees were not legally authorized to work in the United States, but if applicants came to Defendant with a social security number and a false identification card, she could and would hire the applicants, and [Mohawk] would employ the applicants."[12] Martinez further confirmed Carpenter's claim that a large number of Mohawk's temporary workers admitted that they did not have work authorization documents. Martinez testified that, rather than address these issues, Mohawk threatened to fire her if she would not stop seeking information concerning the work eligibility of Mohawk's employees.[13]

The district court similarly recounted testimony from the named plaintiffs who claimed that they had

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[11] *See* Pet. App. 46a-47a.

[12] *Id.* at 45a-46a.

[13] *Id.*

personally witnessed Mohawk's illegal conduct. In her deposition, Shirley Williams testified that her Mohawk supervisor repeatedly expressed a preference for hiring illegal workers because they did their work without complaint or distraction. Williams further testified about Mohawk employees boasting about going to the border to pick up loads of illegal workers and obtaining illegal workers from temporary employment firms. The named plaintiffs further testified about Mohawk employees passing out false social security cards and recounted episodes in which employees would work at Mohawk for a time under one name only to return under different names.[14] Similar evidence about Mohawk "recycling" the same workers under different names has come up again and again in this case. For example, Mohawk produced a June 2005 document that shows Mohawk's customer Wal-Mart demanded an investigation after a Mohawk employee telephoned the Wal-Mart Ethics Hotline to complaint that Mohawk was employing illegal workers who came and went under a succession of different names.[15]

Finally, the district court accepted expert testimony from two economists that plaintiffs offered to establish a method of proving impact and damages with common proof.[16] After carefully considering

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[14] *Id.* at 38a-44a.

[15] *Id.* at 44a-45a.

[16] Pet. App. at 47a-50a & 66a.

Mohawk's competing expert testimony, the district court concluded that plaintiffs' expert evidence was "sufficiently probative to be useful to the Court in determining whether Plaintiffs have satisfied the requirements for class certification."[17]

4. Despite this evidence, the district court denied class certification under Fed. R. Civ. P. 23(b)(3) because Mohawk had decentralized its operations and divisions. The district court based these rulings on a series of Title VII cases that hold that an employer's decentralization may defeat class certification of race discrimination claims.[18] Although plaintiffs argued that those Title VII cases did not apply because their RICO claims did not give rise to the same potential class certification problems, the district court rejected that argument in a footnote.[19]

Finally, the district court declined to certify a Fed. R. Civ. P. 23(b)(2) class because plaintiffs' claim for damages was not incidental to their claims for injunctive relief under the Georgia RICO statute. The district court further refused to certify a "hybrid class" for both monetary and injunctive relief on the theory that having one jury decide both types of claims would be overly cumbersome.[20]

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[17] *Id.* at 66a.

[18] *Id.* at 74a-77a.

[19] *Id.* at 75a n.4.

[20] *Id.* at 7a-8a.

5. After granting plaintiffs permission to appeal, the Eleventh Circuit reversed the district court's order and remanded for further class certification proceedings. That decision had nothing to do with the district court's review of the available evidence versus the allegations of the Complaint. Instead, the court of appeals reversed because the district court applied the wrong law to the evidence and plaintiffs' claims:

> We agree with the employees that the district court erred when it relied on our precedents about the certification of a class action for a complaint of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.[21]

The court of appeals held that the district court made a legal error on this point because plaintiffs' RICO claims are "not dependent on proof of individual acts of disparate treatment as often is the case under Title VII."[22] After identifying this error, the Eleventh Circuit held that the district court was wrong to find against the plaintiffs on commonality and typicality.[23] The court of appeals further concluded that these errors prevented the district court from conducting an

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[21] *Id.* at 11a.

[22] *Id.* at 12a.

[23] *Id.* at 12a-13a.

appropriate analysis of predominance and superiority under Rule 23(b)(3).[24]

In that discussion, the Opinion confirms that the district court may have to look beyond the pleadings and examine how the plaintiffs will prove the merits of the case to determine whether a class should be certified:

> Although "a court should not determine the merits of a claim at the class certification stage, it is appropriate to 'consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.'" [cit] ***A district court must consider, for example, how the class will prove causation and injury*** and whether those elements will be subject to class-wide proof[.][25]

Because the district court's legal error short-circuited that analysis, the court of appeals remanded so that the district court could "conduct a pragmatic assessment" of whether the common questions of enterprise, pattern of racketeering and class-wide proof of the fact of injury predominate over any individual issues.[26] Rather than forbid the district court from examining evidence on remand, the court of appeals instructed the district court to "test and evaluate the

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[24] *Id.* at 17a.

[25] *Id.* at 15(a) (emphasis added) (citations omitted).

[26] *Id.* at 18a.

employees' argument that their injury is subject to common proof."[27]

Finally, the Eleventh Circuit directed the district court to reconsider plaintiffs' request to certify a hybrid class for injunctive relief under Rule 23(b)(2) and (c)(4).[28]

6. Mohawk filed no petition for rehearing in the Eleventh Circuit. When the mandate issued, the district court requested a status report from the parties. In that filing, the parties informed the district court that (a) Mohawk intended to petition this Court for certiorari and (b) the parties intended to pursue private mediation. The district court has stayed all proceedings pending this Court's ruling on Mohawk's Petition.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with any decision of this Court or any court of appeals. Nor does the Eleventh Circuit's decision implicate any important federal question that has not already long been settled by this Court. As a result, Mohawk has not carried its burden to demonstrate "compelling reasons" for granting the Petition as Supreme Court Rule 10 demands.

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[27] *Id.*

[28] *Id.* at 19a-21a.

I. This Court Has Already Answered the Question Presented.

The Petition asks the Court to review "whether a district court abuses its discretion by going beyond the allegations in the complaint and examining the factual record to determine whether the named plaintiffs have satisfied the class certification requirements of Federal Rule of Civil Procedure 23."[29] But the Petition goes on to acknowledge that this Court answered that very question in *General Telephone Co. of the Southwest v. Falcon*, by holding that a district court "may . . . probe behind the pleadings before coming to rest on the [class] certification question."[30] As a result, there is no need for this Court to grant certiorari merely to re-confirm that a district court does not abuse its discretion by looking beyond the pleadings in assessing a class certification motion.

II. The Eleventh Circuit Did Not Address the Question Presented.

The Court should further deny the Petition because the Opinion below does not question the continued vitality of *Falcon* and does not even pass on the question Mohawk urges on the Court. Thus, certiorari should be denied as it is well-settled that

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[29] Pet. at i.

[30] 457 U.S. 147, 160-61 (1982), quoted Pet. at 11.

this Court will not "decide in the first instance issues not decided below."[31]

A. The Eleventh Circuit Corrected A Legal Error That Has No Bearing on the Question Presented.

The crux of Mohawk's Petition is that "[t]he Eleventh Circuit's decision below held in part that the district court erred by looking beyond the pleadings in evaluating class certification."[32] But the Eleventh Circuit made no such holding. Instead, the court of appeals corrected a legal error wholly unrelated to whether the district court was permitted to look beyond the allegations of plaintiffs' complaint.

The district court rejected class certification based on a line of Eleventh Circuit precedent that declines to aggregate individual claims of race discrimination. But the Eleventh Circuit has also held that these precedents do not apply in the federal RICO context, where the plaintiffs must each prove an enterprise and a pattern of racketeering activity as elements of their claim. The court of appeals reversed because the district court applied the wrong line of Eleventh Circuit precedent.[33] The Petition does

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[31] *NCAA v. Smith*, 525 U.S. 459, 470 (1999). *See also Clingman v. Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below").

[32] Pet. at 4.

[33] *See* Pet. App. at 11a.

not seek the writ to review either line of precedents and makes no claim that the Eleventh Circuit erred by requiring the district court to consider the elements of plaintiffs' actual claims in the class certification analysis.

In any event, the Opinion certainly makes no suggestion that the Eleventh Circuit reversed because the district court looked at the evidence in the record. Although the Petition maintains that the court of appeals held that "the allegations in the complaint itself sufficed [to satisfy the Rule 23 requirements] and that the district court abused its discretion by not relying solely upon those allegations," those words do not appear in the Opinion.[34] To bolster its claim, the Petition quotes the Opinion's references to the complaint. But those references can hardly be read as an instruction to ignore the evidence. As this Court has observed, "the class certification determination generally involves considerations enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[35] And *Falcon* recognizes that analyzing those issues often will require the court to examine evidence and other matters *in addition to the pleadings*.[36] But nothing in *Falcon* – or any other case Mohawk has cited – suggests that the courts are prohibited from

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[34] Pet. at 8.

[35] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (internal quotations omitted).

[36] *Falcon*, 457 U.S. at 160.

examining the complaint and the plaintiffs' legal theories in addressing class certification.

B. The Eleventh Circuit Remanded for a Pragmatic Assessment of Predominance and Superiority.

In addition to misrepresenting the basis for reversal, the Petition misstates the Opinion's instructions on remand. Rather than confine the district court to the pleadings, the Eleventh Circuit remanded the case with instructions that the district court "conduct a *pragmatic* assessment of whether common issues predominate over individual issues and whether a class action is superior to other forms of relief under Rule 23(b)(3)."[37] The Opinion further directs the district court to "consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied" and to "consider . . . how the class will prove causation and injury and whether those elements will be subject to class-wide proof."[38]

Rather than instruct the district court to ignore the evidence as the Petition argues, therefore, the Opinion remanded for a rigorous and practical review of the Rule 23 requirements. Because that instruction correctly recites the law, there is no basis for this Court to grant certiorari. In fact, Supreme Court Rule

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[37] Pet. App. at 18a (emphasis added).

[38] Pet. App. at 15a.

10 expressly provides that the writ ***will not be granted*** to review the purported misapplication of a properly stated rule of law.[39]

C. This Interlocutory Appeal Is Not Suited for This Court's Review.

The Eleventh Circuit's decision to remand for further class certification proceedings provides yet another reason to deny the Petition in this case. This Court has long preferred to reserve the writ to review final rather than interlocutory orders.[40] Because the review of a non-final order induces inconvenience, litigation costs and delay, the lack of finality may "of itself alone" furnish "sufficient ground for the denial of the application."[41]

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[39] *See also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (certiorari "depends on numerous factors ***other than*** the perceived correctness of the judgment we are asked to review") (emphasis added); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

[40] *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (the Court's "normal practice is to deny[ ] interlocutory review") (Stevens, J., dissenting). *See generally* Robert L. Stern & Eugene Grossman, *Supreme Court Practice* § 4.4 at 249 (9th ed. 2007) ("It is often most efficient for the Supreme Court to await a final judgment and a petition for certiorari that presents all issues at a single time rather than reviewing issues on a piecemeal basis").

[41] *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).

As this Court noted in *Coopers & Lybrand*, a class certification ruling is an "inherently interlocutory" decision that is not ordinarily appealable.[42] Although Fed. R. Civ. P. 23(f) permits the circuit courts to certify those decisions for appeal under appropriate circumstances, that procedure does not render every class certification decision appropriate for this Court's review. Indeed, plaintiffs' research has failed to identify any case in which this Court granted certiorari to review a Rule 23(f) appeal.

By contrast, the Court has denied Petitions similar to this one in many of the cases Mohawk cites as supposed evidence of a circuit split. In *Szabo v. Bridgeport Machines, Inc.*, 534 U.S. 951 (2001), for example, the Court denied a Petition to review whether the court of appeals erred by refusing to accept the allegations of a complaint at class certification. And in *UnitedHealth Group, Inc. v. Klay*, 543 U.S. 1081 (2005), the Court denied a Petition to review whether the district court may presume the truth of plaintiffs' allegations at class certification.[43] Nor has the Court been swayed by the all-too-predictable argument that class rulings must be

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[42] 437 U.S. at 470.

[43] *See also General Elec. Capital Corp. v. Thiessen*, 536 U.S. 934 (2002) (denying petition to review whether district court is prohibited from making factual findings that overlap with merits issues on class certification); *CenturyTel, Inc. v. Beattie*, 129 S. Ct. 608 (2008); *California v. Standard Oil Co.*, 464 U.S. 1068 (1984); *Roberts v. Barrack*, 429 U.S. 816 (1976).

reviewed because they impose an "intense pressure to settle" a particular case.[44] These decisions confirm that there is nothing about the scope of the district court's authority to review evidence to decide class certification that merits this Court's review.

More than a century ago, the Court advised that it would not "issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."[45] This case cannot meet that standard because the court of appeals merely remanded the case for further class certification proceedings. As a result, Mohawk need only face the inconvenience of re-litigating class certification without reference to the Title VII precedents that led the district court into error. In the unlikely event that the district court concludes it cannot look beyond the pleadings upon remand, Mohawk's argument would squarely be presented for appeal at that time.[46]

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[44] *Compare* Pet. at 25 *with General Motors Corp. v. French*, 516 U.S. 824 (1995) (denying Petition on standards for certifying a settlement class) *and Grady v. Rhone-Poulenc Rorer, Inc.*, 516 U.S. 867 (1995) (denying a Petition to review whether court of appeals erred by decertifying class).

[45] *Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added). *See also Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

[46] As a result, the Petition's claim that the district court only has one opportunity to rule on class certification is wrong on both the law and on the facts of this case. *See* Fed. R. Civ. P.

(Continued on following page)

D. Eleventh Circuit Law Confirms That the District Court Can and Should Look Beyond the Pleadings.

Finally, Mohawk's suggestion that the Eleventh Circuit prohibits a district court from reviewing evidence in addition to the complaint at the class certification stage is not correct. In fact, Mohawk's brief in the court of appeals argued that Eleventh Circuit law *requires* the district court to look beyond the pleadings to ensure the Rule 23 requirements have been met.[47] As Mohawk correctly pointed out in that filing, the Eleventh Circuit repeatedly has affirmed class certification decisions that rely on evidence beyond the pleadings, even when that evidence overlaps with the merits of the plaintiffs' claim. The Petition, by contrast, finds no occasion to

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23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment.").

[47] Brief of Defendant-Appellee Mohawk Indus., Inc., at 36-37 (filed in the Eleventh Circuit on Nov. 10, 2008) ("11th Cir. MHK Br.") (citing and quoting *Heffner v. Blue Cross*, 443 F.3d 1330, 1337 (11th Cir. 2006) ("it is appropriate to 'consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.'"); *Jones v. Firestone Tire & Rubber Co.*, 977 F.2d 527, 535 (11th Cir. 1992); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978); *Huff v. N.D. Cass Co.*, 485 F.2d 710, 713 (5th Cir. 1973) (*en banc*)).

disclose these – or any other Eleventh Circuit – cases that contradict Mohawk's current position.[48]

The Opinion below offers no hint that the Eleventh Circuit has departed from any of the circuit precedents Mohawk previously cited on this point. To the contrary, the Opinion – like Mohawk's appeals court brief – cites *Heffner v. Blue Cross*, for the proposition that the district court should consider the merits to the degree necessary to conduct a rigorous Rule 23 analysis and must consider how the class will prove its claims with common proof.[49] The Opinion further cites *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, a case in which the Eleventh Circuit held that the district court had a duty to look beyond the pleadings and assess the merits to the extent they

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[48] *See Cooper v. Southern Co.*, 390 F.3d 695, 712 (11th Cir. 2004), *overruled in part on other grounds*, 546 U.S. 454 (2006); *Valley Drug v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003) (district court can and should examine evidence to determine whether the case is amenable to class treatment); *Telfair v. First Union Mortg. Co.*, 216 F.3d 1333, 1343 (11th Cir. 2000) ("It was within the court's discretion to consider the merits of the claims before their amenability to class certification."); *Morrison v. Booth*, 730 F.2d 642 (11th Cir. 1984) (remanding for an evidentiary hearing on class certification). *See also In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 5 (1st Cir. 2005) (Eleventh Circuit has aligned itself with majority of circuits in holding "a district court is not limited to the allegations raised in the complaint and should instead make whatever legal and factual inquiries are necessary to an informed determination of the certification issues").

[49] *Compare* 11th Cir. MHK Br. at 37 *with* Pet. App. 15a.

overlapped with the Rule 23 requirements.[50] Because the Opinion breaks no new ground on this point, subsequent Eleventh Circuit decisions continue to recite that the district court can and should look beyond the pleadings and consider the merits to evaluate the class certification requirements.[51]

Mohawk also told the court of appeals that "[n]umerous other circuits are in agreement" with the Eleventh Circuit's repeated holdings on this point.[52] In particular, Mohawk argued that Eleventh Circuit law was in accord with decisions that the Petition now casts on the opposite side of a circuit split. For example, Mohawk argued that Eleventh Circuit law conforms to the Second Circuit's decision in *Miles v. Merrill Lynch & Co., Inc. (In re IPO Securities Litigation)*, and the cases collected therein, as well as the law in the Third and Tenth Circuits.[53] By contrast,

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[50] 350 F.3d 1181, 1188 n.15 (11th Cir. 2003) (citing *Falcon*), cited at Pet. App. 15a.

[51] *See, e.g., Babineau v. Federal Express Corp.*, 576 F.3d 1183, 1190 (11th Cir. 2009) ("While we avoid merits determinations to the extent practicable, this case does require the Court to look beyond the pleadings and examine the parties' claims, defenses and evidence to ensure that class certification would comport with Rule 23's standards").

[52] 11th Cir. MHK Br. at 37.

[53] *Id.* at 37-38 (arguing that Eleventh Circuit law conforms to *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) and the cases collected therein); Letter from Juan P. Morillo to Clerk, Eleventh Circuit (filed Feb. 9, 2009) (Rule 28j letter arguing that *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) supports the district court's class certification ruling);

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the Petition claims that the Eleventh Circuit is in conflict with all those circuits as well as the additional circuit authority cited in *In re IPO Sec. Litig.*[54] Once again, the Opinion is silent on this question and offers no hint of disagreement with any sister circuit on this or any other issue. Because the Opinion does not actually present – or even address – the issue on which Mohawk seeks certiorari, the Petition should be denied.

III. The Eleventh Circuit Opinion Did Not Address Any Claimed Circuit Split.

Despite the Eleventh Circuit's actual decision, the Petition argues that the Opinion takes sides in a circuit split in the courts of appeal. But whatever disagreements the lower courts may have about class certification they do not involve the Question Presented in this Petition: whether district courts may look beyond the pleadings to the factual record to decide class certification. In fact, Mohawk's principal authority for a circuit split confirms that there is no such split over the Question Presented: "[i]t is a ***settled question*** that some inquiry into the merits at the class certification stage is not only

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Supplemental Brief of Defendant-Appellee Mohawk Industries, Inc. at-3-5 (filed in the Eleventh Circuit Mar. 6, 2009) ("MHK 11th Cir. Suppl. Br.") (making similar arguments about *In re IPO Sec. Litig.*, *In re Hydrogen Peroxide* and *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009)).

[54] *See* Pet. at 18-23.

permissible but appropriate to the extent that the merits overlap the Rule 23 criteria." *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008). That observation should come as no surprise because it is exactly what this Court held in *Falcon*. And because every circuit in the country is bound to follow *Falcon*, the leading treatises confirm that the "[c]ircuit courts are in substantial agreement with this rule."[55]

A. No Circuit Courts "Require District Courts to Accept Allegations in the Pleadings."

The Petition argues that the Opinion squarely casts the Eleventh Circuit's lot with the Sixth, Eighth, Ninth, Tenth and D.C. Circuits, all of which have supposedly "held that the district courts may not assess issues that are disputed in the pleadings."[56] A review of the law, however, reveals that all of those circuits follow *Falcon*'s admonition that a district

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[55] 1 Alba Conte and Herbert B. Newberg, NEWBERG ON CLASS ACTIONS, § 3:1 (4th ed. 2009); *see also*, 7AA Charles Alan Wright and Arthur R. Miller, et al., FEDERAL PRACTICE AND PROCEDURE, § 1785 (2009) ("The *Eisen* prohibition addresses the concern that the parties should not have to show a probability of success on the merits in order to prove class certification; it does not limit the court's necessary inquiry into the underlying elements of the case in order to evaluate whether Rule 23 has been met").

[56] Pet. at 14.

court can and should look beyond the pleadings to decide class certification.

D.C. Circuit: First, the Petition claims that the D.C. Circuit is a jurisdiction that precludes district courts from looking beyond the pleadings. But in *Wagner v. Taylor*, the D.C. Circuit held that "[i]t is readily apparent that a decision on class certification cannot be made in a vacuum."[57] Instead, *Wagner* explains that an "inspection of the circumstances of the case is essential to determine whether the pre-requisites of Federal Civil Rule 23 have been met" and that the district court must examine both the plaintiff's claims "and the showing in support of class certification" to make that determination.[58] *Wagner* thus makes plain that the D.C. Circuit has not limited district courts to the pleadings on class certification.[59]

Sixth Circuit: The Petition next argues that the Sixth Circuit is a no look jurisdiction, but that court's decision in *Rodney v. Northwest Airlines, Inc.*

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[57] 836 F.2d 578, 587 (D.C. Cir. 1987). *See also Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 531 n.5 (D.C. Cir. 2006) ("the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action") (*quoting Falcon* and *Coopers & Lybrand*).

[58] *Wagner*, 836 F.2d at 587.

[59] *See In re PolyMedica*, 432 F.3d at 6 (citing *Wagner* as evidence that the D.C. Circuit does not limit district courts to the pleadings on class certification).

confirms that "a court is allowed to look beyond the pleadings on a class certification motion to determine what type of evidence will be presented by the parties."[60] In fact, the Sixth Circuit observed more than twenty-five years ago that "ordinarily the [Rule 23] determination should be predicated on ***more information than the pleadings will provide***."[61] The court of appeals repeated the same sentiment more recently in *Reeb v. Ohio Department of Rehabilitations & Corrections*:

> Ordinarily, a district court must determine the permissibility of class certification based upon information other than that which is in the pleadings although it may do so based on the pleadings alone where they set forth sufficient facts. [cit] In making such a determination, a district court may draw reasonable inferences from the facts before it.[62]

In a subsequent *Reeb* decision, the Sixth Circuit reversed a class certification order because the district court had not sufficiently reviewed the

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[60] 146 Fed. Appx. 783, 785 (6th Cir. 2005).

[61] *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974) (emphasis added).

[62] 81 Fed. Appx. 550, 555 (6th Cir. 2003) (citing *Senter v. General Motors*, 532 F.2d 511, 520-23 (6th Cir. 1976)).

evidence to ensure that the plaintiffs had met Rule 23's requirements, as *Falcon* demands.[63]

Eighth Circuit: The Petition turns next to the Eighth Circuit and argues that *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005) precludes a district court from looking beyond the pleadings at class certification.[64] But *Blades* actually holds that, "a court ***must*** conduct a limited preliminary inquiry, ***looking behind the pleadings***" to determine whether Rule 23's requirements are met.[65] *Blades* further observed that, "[t]he preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case."[66] Of course, *Blades* is not an outlier in this respect because the Eighth Circuit reversed class certification more than 25 years ago in *Bishop v. Committee on Professional Ethics & Conduct*, because the district

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[63] *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 644-45 (6th Cir. 2006).

[64] Pet. at 15.

[65] 400 F.3d at 566 (emphasis added).

[66] *Id.* at 567. In addition to missing this language, the Petition misstates the actual ruling in *Blades*. Rather than reverse the denial of class certification because the district court examined the evidence, the *Blades* court actually confirmed that common evidence of impact could not be assumed and held that "parts of the *extensive evidence* produced in this case demonstrate that not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy." *Id.* at 571 (emphasis added).

court failed to "probe behind the pleadings before coming to rest on the certification question."[67]

Ninth Circuit: With respect to the Ninth Circuit, the Petition acknowledges that the court of appeals there recently confirmed that courts "are not only 'at liberty to' ***but must 'consider evidence*** which goes the requirements of Rule 23 [at the class certification stage] even if the evidence may also relate to the underlying merits of the case.'"[68] Mohawk nevertheless argues that the Ninth Circuit precludes district courts from considering this evidence based on a footnote in a 1975 opinion that pre-dates *Falcon*.[69] That conclusion would surprise the Ninth Circuit, which repeatedly has held that district courts are "at liberty to consider evidence which goes to the requirements of Rule 23[.]"[70] In fact, less than two months before Mohawk filed its Petition, the Ninth Circuit reaffirmed that "[o]ur cases stand for the unremarkable proposition that

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[67] 686 F.2d 1278, 1288 (8th Cir. 1982) (quoting *Falcon*).

[68] Pet. at 16 n.7 (quoting *Dukes v. Wal-Mart, Inc.*, 556 F.3d 919 (9th Cir. 2009)) (emphasis added).

[69] *Id.* (citing *Blackie v. Barrack*, 524 F.2d 891, 902 n.17 (9th Cir. 1975)). Even though *Blackie* pre-dates *Falcon*, the opinion in *Blackie* noted that the district court had properly considered additional materials and proof to determine how the plaintiffs would prove their claims in addition to the complaint. *Blackie*, 524 F.2d at 900-01.

[70] *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992).

often the pleadings alone will not resolve the question of class certification[.]"[71]

Tenth Circuit: Finally, the Petition turns to the Tenth Circuit and claims that the court of appeals there requires the district court to accept the complaint's allegations without further inquiry. Although the Petition cites *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009) to support that claim,[72] Mohawk told the court of appeals that *Vallario* allows the district court to examine the underlying merits at class certification.[73] And *Vallario* holds that while the district court may not pass on the strength of the plaintiff's claims at class certification, the court must nevertheless conduct a rigorous analysis and make findings that each of the Rule 23 requirements are met.[74]

In addition, the Tenth Circuit long ago rejected the notion that a district court was required blindly to accept a complaint's allegations when passing on class certification: "We note . . . that a class action does not exist merely because it is so designated by the pleadings."[75] Rather than just alleging the case

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[71] *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) (collecting authority).

[72] *See* Pet. at 17-18.

[73] MHK 11th Cir. Suppl. Br. at 3 (quoting *Vallario*).

[74] 554 F.3d at 1266-67 (collecting much of the same authority cited in the Petition).

[75] *Rossin v. Southern Union Gas Co.*, 472 F.2d 707, 712 (10th Cir. 1973) (*quoting Cash v. Swifton Land Corp.*, 434 F.2d 569, 571 (6th Cir. 1970)).

should go forward as a class, "[t]he plaintiff has the burden of proving that the action is appropriately a class action."[76] The case Mohawk cites for the contrary proposition, *Shook v. Board of County Commissioners*, actually turns on the legal question of whether the Prison Litigation Reform Act supplanted the Rule 23 requirements for certifying class actions in the prison context.[77] When the Tenth Circuit revisited *Shook* in 2008, it affirmed that the district court was permitted to reject class certification if "the plaintiffs' ***showing*** under Rule 23(b)(2)" was deficient, even in the face of allegations that suggested the plaintiffs were likely to succeed on their individual claims.[78]

Remaining Circuits: In addition to wrongly suggesting that these six circuits have ignored *Falcon*'s admonition to look beyond the pleadings, the Petition argues that six other circuit courts allow the district court "far more latitude" to "make class determinations based upon the facts adduced during class discovery."[79] To the extent Mohawk's argument is

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[76] *Id.* (citing additional authority).

[77] 386 F.3d 963, 974 (10th Cir. 2004) ("*Shook I*") (district court erred by not applying the Rule 23 requirements based on the PLRA). *See also Shook v. Bd. of County Comm'rs*, 543 F.3d 597, 601-02 (10th Cir. 2008) ("*Shook II*") (*Shook I* held that the PLRA does not alter Rule 23's requirements).

[78] *Shook II*, 543 F.3d 597, 613 (10th Cir. 2008) (emphasis added). *See also Vallario*, 554 F.3d at 1266-67 (discussing *Shook I and II*).

[79] Pet. at 18.

that these circuits also follow *Falcon*, that only confirms that there is no question for this Court to review. Moreover, every circuit – and most of the cases – the Petition cites as giving the district court "more latitude" to look beyond the pleadings acknowledges the prohibition on deciding whether the plaintiff will prevail on the merits, as this Court decided in *Eisen v. Carlisle & Jacquelin*, 417 U.S 156, 177 (1974).[80] Accordingly, there is simply no merit to the Petition's suggestion that the circuits have divided over whether a district court may look beyond the pleadings at class certification.

B. Neither the Petition Nor the Opinion Below Presents Any *Other* Disagreement Over Class Certification.

To be sure, the lower courts have come to varying conclusions over ***other*** questions of class certification

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[80] *See In re IPO Sec. Litig.*, 471 F.3d at 32-41 (extensive discussion of *Eisen*, which is "properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166-68 (3d Cir. 2001) (discussing *Eisen*); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (*Eisen* prevents court "from expanding the Rule 23 certification analysis to include consideration of whether the proposed class is likely to prevail ultimately on the merits"); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007) ("*Eisen* . . . stands for the unremarkable proposition that the strength of a plaintiff's claim should not affect the certification decision"); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (*Eisen* and Rule 23 preclude court from saying "I'm not going to certify a class unless I think that the plaintiffs will prevail").

mechanics. For example, *In re IPO Securities Litigation*, 471 F.3d at 32-37, resolves an internal Second Circuit disagreement over what standard of proof applies at the Rule 23 stage. But even Mohawk does not argue that the Eleventh Circuit's decision in this case turned on that question. Although the Court "decides questions of public importance, it decides them in the context of meaningful litigation," and not in cases where the decision would be abstract or supervisory.[81] As a result, the Court should not grant certiorari to address this or any other class certification that is not fairly presented in this appeal.

CONCLUSION

The Petition concedes that this Court has already answered the Question Presented. As a result, there is no circuit split over whether a district court may probe beyond the pleadings to decide class certification. Because the Eleventh Circuit's decision in this case does not fairly present any important or contested question of federal law, the Petition cannot

[81] *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959), *quoted in* Grossman, *Supreme Court Practice* at 248. *See also Rogers v. United States*, 522 U.S. 252 (1998) (dismissing writ as improvidently granted after concluding the case did not fairly present the issue on which certiorari was granted).

provide compelling reasons for this Court's review. Accordingly, the Petition should be denied.

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Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY

The petition for certiorari asks the Court to resolve a 6-6 circuit split over "the extent to which a district court may look beyond the pleadings to resolve factual disputes in the record in determining whether to certify a class under Rule 23." Pet. 10. One set of circuits holds that a district court must accept plaintiffs' substantive allegations as true, while another group of circuits permits courts to evaluate whether factual support exists for the allegations underlying class certification. *Id.* at 12–23.

In an effort to confuse the issue, plaintiffs mischaracterize the split as involving "whether a district court *may* look beyond the pleadings." Br. in Opp. 1 (emphasis added). See also *id.* at 24, 30. That is not the issue that divides the circuits. That issue is whether, in probing behind the pleadings, the court must accept the pleadings' substantive allegations as true.

Plaintiffs also wrongly contend that this case is a poor vehicle to examine the question presented. The district court below held that plaintiffs' theory of class certification—that a diffuse class of employees was united because they were all the victims of a single wide-ranging RICO enterprise and a single conspiracy—has no support in the extensive class discovery record. The Eleventh Circuit reversed the district court because plaintiffs' complaint alone contained such allegations, thereby requiring the district court to accept the complaint's most fundamentally important substantive allegations at face value. This case provides a perfect vehicle to address the split because the question presented was

fully decided below and its outcome is fundamental to the further conduct of this case. Accordingly, this Court should grant certiorari to address the important federal issue in this case and to resolve the division among the courts of appeals.

I. The Circuits Are Divided Over Whether A District Court Must Accept Substantive Allegations As True For Class Certification Purposes.

A deep, acknowledged split divides the circuits over the extent to which a district court can test the complaint's substantive allegations in deciding a Rule 23 motion. Indeed, the twelve regional circuits are split evenly: six circuits require courts to accept as true the pleadings' substantive allegations, and six do not. See Pet. 12–23. As the First Circuit put the issue, "[t]he circuits are divided" over whether "a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another," or whether "the complaint's allegations are necessarily controlling." *Tardiff v. Knox County*, 365 F.3d 1, 4–5 & n.5 (1st Cir. 2004). See also *Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 186 (3d Cir. 2001) (describing the issue as "whether in making a class certification decision the court must take as true the allegations in the complaint where those allegations are unsupported, and in some instances rebutted, by a well-developed record").

Plaintiffs miss the mark entirely, claiming that "there is no circuit split over whether a district court *may* look beyond the pleadings" because "the lower courts are all bound to follow" this Court's holding that "a district court '*may* ... probe behind the

pleadings before coming to rest on the [class] certification question.'" Br. in Opp. 1 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160–61 (1982)) (alteration in original) (emphasis added). *Falcon* did settle the antecedent question of whether a court may ever "probe behind the pleadings." But this Court has not addressed the logical follow-up issue over which the circuits are divided: whether, in probing behind the pleadings, the court must accept the pleadings' substantive allegations as true.

The circuit conflict over this issue stems from the tension between this Court's decision in *Falcon* and its decision in *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974). See Pet. 11–12. Circuits requiring acceptance of the complaint's substantive allegations have perceived *Falcon's* holding that "it may be necessary for the court to probe behind the pleadings," *Falcon*, 457 U.S. at 160–61, as being circumscribed by *Eisen's* statement that "nothing in ... Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits." *Eisen*, 417 U.S. at 177. Circuits on the other side have not read *Eisen* as requiring a district court to accept the pleadings' substantive allegations as true when it "probe[s] behind the pleadings," and rely on the class discovery record to determine whether to certify a class.

The First, Second, Third, Fourth, Fifth, and Seventh Circuits all permit or require a district court to test the pleadings' relevant substantive allegations before deciding whether to certify a class. See Pet. 18–23. The Fourth Circuit has reversed a grant of class certification, for example, because "by accepting the plaintiffs' allegations for purposes of certifying a class in this case, the district court failed to comply adequately with the procedural requirements of Rule

23." *Gariety v. Grant Thornton LLP*, 368 F.3d 356, 365 (4th Cir. 2004).[1]

By contrast, the Eleventh Circuit's decision below faulted the district court for not accepting the complaint's allegations that the almost 50,000 putative class members were united because they were all victims of a single RICO enterprise and a single conspiracy. Pet. App. 11a–13a. By requiring the district court to accept the complaint's substantive allegations as being true, the Eleventh Circuit followed the approach taken in the D.C., Sixth, Eighth, Ninth, and Tenth Circuits. See Pet. 14–18. For example, the Tenth Circuit has explained that in deciding a motion for class certification, "the court must accept the substantive allegations of the complaint as true." *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004).[2] As a result, Plaintiffs

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[1] See also, *e.g.*, *Miles v. Merrill Lynch & Co.*, 471 F.3d 24, 41 (2d Cir. 2006) (requiring "judge [to] resolv[e] factual disputes relevant to each Rule 23 requirement and [to] fin[d] ... whatever underlying facts are relevant to a particular Rule 23 requirement"); *Oscar Private Equity Inv. v. Allegiance Telecom*, 487 F.3d 261, 266 (5th Cir. 2007) (holding "court must consider all evidence, both for and against loss causation, at the class certification stage"); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) ("The proposition that a district judge must accept all of the complaint's allegations ... cannot be found in Rule 23 and has nothing to recommend it.").

[2] See also, *e.g.*, *McCarthy v. Kleindienst*, 741 F.2d 1406, 1413 n. 8 (D.C. Cir. 1984) (holding it "would be impermissible at this stage of the proceedings" to examine factual dispute over affirmative defense); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552–54 (6th Cir. 2006) (refusing to consider dispute over affirmative defense because it was a "merits issue"); *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975) ("The court is bound to take the substantive allegations of the complaint as true.").

are simply wrong to assert that "no circuit courts require district courts to accept allegations in the pleadings." Br. in Opp. 23 (internal quotation marks omitted).

The Eleventh Circuit and the other five circuits aligned with it require a district court to accept substantive allegations in the pleadings and only permit them to "probe behind the pleadings" to supplement those allegations to evaluate, for example, the *nature* of the proof that would be introduced to establish common injury or proof of damages. For example, in *Blades v. Monsanto* the Eighth Circuit explained that district courts can "resolve disputes going to the factual setting of the case," but "only insofar as resolution is necessary to determine the *nature* of the evidence that would be sufficient, *if the plaintiffs general allegations were true*, to make out a prima facie case for the class." 400 F.3d 562, 567 (8th Cir. 2005) (emphasis added).

Each of the cases discussed by plaintiffs stands only for the unremarkable proposition that a district court *can* evaluate the factual record when the issue is not resolved by the pleadings alone. See Br. in Opp. 19–30. The issue, however, is whether a district court, in probing behind the pleadings, must accept the pleadings' substantive allegations as true. And on that issue, the circuits are deeply divided.

It is axiomatic that the "district court's ruling on the certification issue is often the most significant decision rendered" in the course of a class action. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Although "[t]he circuits are divided," *Tardiff*, 365 F.3d at 5 n.5, and lower courts have noted that "little guidance is available" on this issue, *In re*

Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 (3d Cir. 2008), "the Supreme Court has said little about meeting Rule 23 requirements." *Miles v. Merrill Lynch & Co., Inc.*, 471 F.3d 24, 33 n.4 (2d Cir. 2006). See also Pet. 23–28. Accordingly, this Court should grant Mohawk's petition to provide guidance on whether (and to what extent) courts can test the pleadings' substantive allegations in ruling on a class certification motion.

II. This Case Provides A Good Vehicle To Address The Question Presented.

A. The Eleventh Circuit Opinion Cleanly Presents An Opportunity To Resolve The Circuit Split.

Plaintiffs incorrectly assert that the decision below "had nothing to do with the district court's review of the available evidence versus the allegations in the Complaint." *Id.* at 9. Rather, they argue, the Eleventh Circuit merely "corrected a legal error wholly unrelated to whether the district court was permitted to look beyond the allegations of plaintiffs' complaint." *Id.* at 1, 13.

Plaintiffs are simply wrong, and the Eleventh Circuit's decision cannot be read any other way except as relying solely on the pleadings to reverse the district court's determinations on commonality and typicality. Plaintiffs moved for certification on the ground that the class claims were common (and thus the named plaintiffs' claims were typical) because all class members were injured by a single "corporate-wide RICO enterprise" and "one grand conspiracy." Pet. App. 74a, 75a n.4. See also, *e.g.*, Pls.' Mot. for Class Cert. 20 ("Here, the issues ... [of] whether Mohawk conducted or participated in the

affairs of *an enterprise* ... and participated in *a conspiracy* ... are issues that would have to be resolved in every class member's individual RICO claim against Mohawk.") (emphasis added).

The district court examined the factual record and denied class certification: "Contrary to Plaintiffs' arguments that [Mohawk] engaged in one grand conspiracy to employ illegal workers, the evidence in the record indicates ... that [Mohawk's] relationships with the various temporary employment agencies occurred on a division-by-division basis, rather than on a corporate-level basis." Pet. App. 74a. Likewise, the district court concluded that "the evidence in the record ... fails to support Plaintiffs' contention that [Mohawk] engaged in a corporate-wide RICO enterprise with temporary employment agencies." *Id.* at 75a n.4.

The Eleventh Circuit reversed the district court based *solely* upon the plaintiffs' allegations in the complaint. It held that the district was compelled to find that Rule 23's requirement of commonality was met because the "*complaint* raises questions that are common to all members of the class." *Id.* at 12a (emphasis added). The Eleventh Circuit further reversed the district court on typicality based solely upon the legal theory in the complaint, holding that "although [Plaintiffs'] legal theory may ultimately not be sustained by the evidence, it is typical of the class of which [named plaintiffs] are representative." *Id.* at 13a. The issue, therefore, is not that the Eleventh Circuit corrected a legal error, but that it required the district court to accept the most fundamentally important allegations in the complaint at face value.

Likewise, plaintiffs are wrong to claim that the decision below merely "corrected a legal error wholly unrelated to" the question presented. Br. in Opp. 13. The error plaintiffs identify is the conclusion below that the district court should not have applied Title VII class certification authority to this case, and, conversely, that it should have applied its RICO precedent, *Klay v. Humana*, 382 F.3d 1241 (11th Cir. 2004). See Br. in Opp. 9–10, 13–14. This issue over the proper Eleventh Circuit precedent, however, is completely dependent upon the underlying issue presented in this petition: whether a court must accept the substantive allegations as true at the class certification stage. This is because the Eleventh Circuit concluded that *Klay* applied only *because* it first assumed that the complaint's substantive allegations were true.

Plaintiffs moved to certify a class in reliance upon "*Klay*['s holding] that questions concerning the existence of a RICO enterprise, pattern of racketeering activity and conspiracy are common questions that predominate." Pls.' Mot. for Class Cert. 20. The district court noted that it "understood and appreciated Plaintiffs' argument," but concluded that it "[could] not simply ignore the evidence in the record, which fails to support" the complaint's common allegations that plaintiffs were injured by a single RICO enterprise or conspiracy. Pet. App. 75a n.4. See also *id.* at 74a–75a, 77a–78a. Absent a single enterprise or conspiracy this case was more akin to certain Title VII discrimination cases, which may not be certified if the factual variations in each class member's cause of action are inconsistent with class treatment. See *id.* at 74a–75a, 77a–78a.

The decision below, however, held that "the district court erred when it relied on ... precedents about the certification of a class action for a [Title VII] complaint." Pet. App. 11a. This was error, according to the court of appeals, because "claims under RICO, in contrast with claims under Title VII, are often susceptible to common proof." *Id.* Specifically, the court of appeals found it significant that it "often is the case under Title VII" that the "*complaint* is ... dependent on proof of individual acts of disparate treatment," which renders such cases not "susceptible to common proof." *Id.* at 11a–12a (emphasis added). In contrast, RICO cases are more "susceptible to common proof" because *allegations* of racketeering activity and enterprise do not vary from class member to class member, but rather constitute the "essential elements of each plaintiff's RICO claims." *Id.* (quoting *Klay,* 382 F.3d at 1257). The district court's error in applying Title VII precedent, therefore, consisted solely of its failure to accept without challenge the complaint's substantive allegations that a single enterprise and conspiracy existed. In sum, the dispute over the proper Eleventh Circuit precedent to apply is completely dependent upon the issue presented by this petition: whether a complaint's substantive allegations must be accepted at the class certification stage.

B. This Court Should Not Wait To Address The Question Presented.

Plaintiffs incorrectly argue that this Court should not grant Mohawk's petition because this case is before the Court on an interlocutory appeal under Rule 23(f). See Br. in Opp. 16–18.

This Court has repeatedly accepted interlocutory review of class action questions because of the transformational importance of the issue as to whether a case proceeds as a class action. See, *e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549–50 (2005) (granting certiorari to resolve circuit split, in an interlocutory appeal, over whether court may assert "supplemental jurisdiction over the claims of class members who did not meet the jurisdictional minimum amount in controversy"); *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 172 (1974) (granting certiorari to review, under "collateral order" doctrine, district court's allocation of class notice costs); *Snyder v. Harris*, 394 U.S. 332, 334 (1969) (granting certiorari "to resolve the conflict between" the circuits, in an interlocutory appeal, over whether "claims brought together in a class action could ... be aggregated for the purpose of establishing the jurisdictional amount in diversity cases").

With respect to review of class certification decisions, Rule 23(f) was enacted only recently in 1998. Significantly, Rule 23(f) represented an important "expansion of ... opportunities to appeal ... in cases that show appeal-worthy [class] certification issues." Fed. R. Civ. P. 23(f), advisory committee note of 1998. That rule acknowledged "several concerns justify[ing this] expansion," including the reality that class certification "may force a defendant to settle rather than incur the costs of defending a class action." *Id.* The advent of Rule 23(f) thus reflects this Court's concern that the "district court's ruling on the certification issue is often the most significant decision rendered" in the course of a class action. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). As a result, this Court should not be

reluctant to review important questions decided on a Rule 23(f) appeal—just as it does not refuse to review other issues that can be appealed and decided on interlocutory review.

The issue presented in this petition is the subject of a 6-6 circuit split and is of crucial importance to the conduct of class action litigation. The time is ripe for this Court's review in order to settle this deep divide on an important question going to the core of the class certification inquiry that a district court must conduct.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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